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Case I

77593
Supreme Court
U.S.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 262

LOUIS J. BECKER, COLLECTOR OF INTERNAL REVENUE, PETITIONER

vs.

ST. LOUIS UNION TRUST COMPANY AND WILLIAM EDWIN GUY, EXECUTORS OF THE ESTATE OF WILLIAM EVANS GUY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 13, 1935
CERTIORARI GRANTED OCTOBER 14.

SUPREME COURT OF THE UNITED STATES

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A [Caption omitted.]

1 [Citation in usual form showing service on Louis J. Becker et al., filed July 6, 1934, omitted in printing.]

2 In United States District Court for the Eastern Division of the Eastern Judicial District of Missouri

March term, 1933

Cause No. Division No.

ST. LOUIS UNION TRUST COMPANY, A CORPORATION, AND WILLIAM Edwin Guy, executors of the estate of William Evans Guy, plaintiffs

vs.

LOUIS J. BECKER, DEFENDANT

Petition

Filed May 1, 1933

Come now St. Louis Union Trust Company and William Edwin Guy, plaintiffs in the above-entitled cause, and state:

1. That plaintiff St. Louis Union Trust Company is a corporation created and existing under and by virtue of the laws of the State of Missouri with respect to trust companies with its principal office in the city of St. Louis, Missouri, and in the Eastern Division of the Eastern Judicial District of Missouri;

2. That plaintiff William Edwin Guy is a resident and inhabitant of the city of St. Louis and of the Eastern Division of the Eastern Judicial District of Missouri;

3. That William Evans Guy, deceased, departed this life a resident of the city of St. Louis and a resident of the Eastern Judicial District of Missouri and the First Internal Revenue District of Missouri on the 24th day of July, 1928, leaving a last will and testament which was duly filed for probate and admitted to probate in the probate court of the city of St. Louis, Missouri, on the 30th day of July, 1928, by the terms of which said will plaintiffs herein were appointed executors of the estate of said decedent, and that on the 30th day of July, 1928, said probate court duly issued letters testamentary to the plaintiffs herein as executors of said estate, who, on said 30th day of July, 1928, duly qualified as such executors and have ever since and are now acting as executors of the estate of said decedent;

4. That defendant, Louis J. Becker, is and was at all the times hereinafter mentioned United States Collector of Internal Revenue for the First District of Missouri, which said district includes the city

of St. Louis, Missouri, and defendant is a resident and inhabitant of the Eastern Division of the Eastern Judicial District of Missouri;

5. That this case arises under a law of the United States providing for internal revenue, to wit, the Revenue Act of 1926;

6. That the fair market value at the time of his death of the net estate of William Evans Guy, deceased, excluding therefrom the value of certain property transferred by said decedent during his lifetime, as hereinafter set forth, was $858,414.13; that the amount of Federal estate tax due and payable thereon under the rates prescribed by the Revenue Act of 1926 in effect on said 24th day of July 1928 was $38,588.99; that against said tax plaintiffs are entitled to credit for inheritance taxes paid to the states of Missouri, Kansas, New York and Ohio, and for an estate tax paid to the State of Missouri, in the sum of $30,252.80, so that the net Federal estate tax due and payable to the United States and to the defendant upon the net estate of William Evans Guy, deceased, excluding therefrom the value of the property transferred, as hereinafter set forth, by decedent during his lifetime, was $8,336.19;

7. That on the 24th day of July 1929 plaintiffs, as such executors, filed with the defendant, a return for Federal estate tax of the said estate showing a net estate subject to tax of $756,600.82, and further showing a total estate tax due of $34,860.05 against which sum plaintiffs claimed credit for estate, inheritance, legacy and succession taxes amounting to $27,808.04, and paid to the defendant as and for the estate tax payable upon said net estate, after deducting credits, the sum of $6,972.01, which sum was $1,364.18 less than the amount payable as such tax upon the value of such net estate, excluding therefrom the value of property transferred by decedent during his lifetime, as hereinafter set forth, which sum of $1,364.18, together with interest thereon amounting to $159.42, making a total payment of $1,523.60, was paid to defendant by plaintiffs on June 30, 1931;

8. That the said William Evans Guy, on January 3, 1921, executed four separate written declarations of trust naming one of his four children, Katherine Guy Fenimore Cooper, William Edwin Guy, David Wade Guy and Evelyn S. Guy as the beneficiary in each instrument by the terms of each of which declarations of trust the said William Evans Guy conveyed to himself as trustee for the respective beneficiary identical property. Said declarations of trust, with the exception of the names of the beneficiary and the personal pronoun applicable to the beneficiary were identical. The said declaration of trust in favor of decedent's daughter Evelyn S. Guy is in words and figures as follows:

"Declaration of trust for Evelyn S. Guy

"I, William Evans Guy, of the city of St. Louis, and State of Missouri, hereby declare, this third day of January 1921 that I hold

in trust for my daughter, Evelyn S. Guy, the following property, to wit:

"Sixty thousand dollars ($60,000.00) in par value of the five-percent income bonds of the New Orleans, Texas & Mexico Railway Company, with coupons maturing April 21, 1921, and subsequently attached; also twelve thousand dollars ($12,000.00) in par value of the St. Louis Union Trust Company's five-percent certificates of the Annuity Realty Company;

"with the powers and for the uses and purposes hereinafter set forth as follows:

"1. I am to have the power at any time, and from time to time, to sell any of the trust property or estate, for such price and prices as I may determine. Any money coming into my hands as the proceeds of any such sale or otherwise and forming a part of the principal of said trust estate shall as soon as practicable, be reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted to the purchase of such property as is ordinarily deemed advisable for trust property. I am likewise to have the power to rent or lease any and all real estate which may be included in said trust property for terms of any duration, whether such terms shall extend to a time beyond the termination of this trust or not. I am likewise to have full power and authority in my discretion to borrow money and secure the sums so borrowed by pledge or mortgage of any and all portion of said trust estate and I may out of the corpus or income of said trust estate, or out of both such corpus and income repay the same so borrowed. I am to have full authority to invest or reinvest any sums so borrowed; and to collect and receive the rents, income and profits arising from the trust estate therein created. It being my intention to retain as trustee such rights, power, and authority in respect to the management, control, and disposition of said trust estate for the use and benefit of the beneficiary, as I have with respect to property absolutely owned by me.

"2. Out of the income and revenue accruing from said trust estate I shall have power to pay all taxes, expenses necessarily or properly incident to its care, preservation, and management; and all other reasonable or necessary charges incident to the administration of the trust created hereby, and out of the remaining income and revenue, I am to pay the beneficiary of this trust an allowance of $300 a month, with power in my discretion from time to time to increase or decrease the said allowance whenever I may deem it to be the best interest of the said beneficiary, to have such allowance increased or decreased. I shall have the power, from time to time, out of the remainder of said income and revenue, to appropriate and pay such sums as I may deem reasonably necessary for the maintenance, support and education of said beneficiary. Any in-

come not distributed as hereinabove provided shall be added to the principal of the trust estate.

"3. In case of an emergency, or illness of said beneficiary, requiring a greater sum than that accruing as income or revenue, I shall have power to use as much of the principal of said trust estate as may be absolutely necessary.

"4. Any receipt given by the beneficiary of this trust to me for any sum paid to her by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

"5. The foregoing provisions for my said daughter, Evelyn S. Guy, shall be for her sole and separate use, free from all statutory and marital rights of her husband; and free from her debts and without the right on her part to assign, pledge, hypothecate, or anticipate, or in any way create a lien upon any of the income or corpus of the trust estate hereby created before she shall receive the same, nor shall any of the said income or corpus be subject to any claims of any persons who may at any time be creditors of my said daughter.

"6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease."

"WILLIAM EVANS GUY.

"Witness:
WM. EDWIN GUY."

9. That on January 2, 1922, November 9, 1922, January 1, 1923, December 21, 1923, April 1, 1924, January 1, 1925, April 1, 1927, and December 20, 1927, the said William Evans Guy made additions to each of the funds created by said declarations of trust in equal amounts and subject to the terms of the original instruments;

10. That immediately upon the execution of said declarations of trust the said William Evans Guy undertook the performance of his duties as trustee thereunder and continued to faithfully perform said duties until the time of his death and managed the property and trust funds transferred thereunder for the sole use and benefit of each said beneficiary and accounted to said beneficiaries for all income arising therefrom in accordance with the terms and provisions of said instrument;

11. That on January 3, 1921, the date of the execution of the aforesaid declarations of trust, the said William Evans Guy was just over seventy-six years of age, having been born December 22, 1844. The four beneficiaries of said declarations of trust were all the children and the only children living of said William Evans Guy.

Of these Katherine Guy Fenimore Cooper was twenty-five years eleven months old, having been born on February 26, 1894, William Edwin Guy was twenty-four years seven months old, having been born July 30, 1896, David Wade Guy was twenty-three years and three months old, having been born February 28, 1897, and Evelyn S. Guy, was twenty-one years and ten months old, having been born April 10, 1899. The said William Evans Guy had for some time previous to said 3rd day of January, 1921, enjoyed
6 unusually good health and continued to enjoy such good health until the month of July 1928, at which time he contracted the illness which resulted in his death. During this period he maintained a downtown office in St. Louis, Missouri, which he visited daily and from which he managed and kept in touch with his investments and other business connections which were numerous and large. He was a director of several business corporations during this period, was trustee and a member of the financial committee of the Second Presbyterian Church, and in general was as active as he had been ever since he severed direct connection with his railroad enterprises in 1903. During said period from before January 1921, until he contracted his final illness, Mr. Guy did not suffer any serious illness nor was he suffering from any impairment of health, nor did he have any reason to expect death in the imminent or immediate future, nor did he have any expectation of the approach of death other than the normal expectation of a man of his age that death would eventually overtake him. He was in the habit of consulting his personal physician, Doctor Walter Fischel, two or three times a year for a general examination, and submitting to an examination at regular intervals by physicians employed by a group of insurance companies, and at no time during said period, as a result of such examinations, was he advised by any physician that he was suffering from any impairment of health or suffering from any disease which might give him reason to expect death in the near or immediate future. On the contrary, he consulted Doctor Fischel for his usual general examination as late as the month of June 1928, at which time Doctor Fischel found him in especially good health. The said William Evans Guy had a cheerful and optimistic disposition and was often heard to state to his intimates that his father had lived to be more than ninety years old and that he expected to do the same;

12. That the value at the time of Mr. Guy's death of all property transferred by him during his lifetime under said declarations of trust was $994,195.00, and that the value at the time of his death of the property transferred under said declarations by him within two years prior to his death and after the effective date of the Revenue Act of 1926, was $190,075.00;

13. Thereafter, the Commissioner of Internal Revenue determined that the value of the property transferred by decedent during his lifetime under said four declarations of trust should be included

in the gross estate of said decedent for estate tax purposes
8 for the reason that the transfers of said property in trust did not take effect in possession or enjoyment until at or after the death of the decedent within the meaning of section 302 (c) of the Revenue Act of 1926, and so advised these plaintiffs by letters dated September 16, 1930, May 9, 1931, and July 16, 1931:

14. Pursuant to said determination and solely as a result of the inclusion by the Commissioner of Internal Revenue in said gross estate of the value of said property transferred by decedent during his lifetime, there was assessed against said estate and paid by plaintiffs to defendant upon notice and demand for payment made upon plaintiffs by defendant, as a deficiency with respect to the Federal estate tax of said estate with interest thereon, the sum of $94,022.35, which said sum was paid by plaintiffs to defendant as follows: $22,190.40 on June 30, 1931, and $71,831.95 on July 11, 1932;

15. That thereafter, on the 11th day of August 1932, plaintiffs duly filed with the defendant their claim in due form and properly executed for refund of an amount in excess of said sum of $94,022.35, paid by the plaintiffs to defendant, as aforesaid, on the 30th day of June 1931 and the 11th day of July 1932, and as grounds for the allowance of their claim alleged, insofar as the allegations of said claim relate to the issues herein involved, as follows:

"1. The above deficiency tax results from the action of the Commissioner of Internal Revenue in including in the gross estate $994,195.00 representing the value of property transferred by decedent during his lifetime under four separate declarations of trust * * *.

"2. The property represented by said $994,195.00 was not transferred by decedent in contemplation of or intended to take effect in possession or enjoyment at or after his death.

"3. Section 302 (c) of the Revenue Act of 1926, insofar as the same provides that the property transferred by a decedent within 2 years prior to his death, shall be deemed to be transferred in contemplation of death, whether or not such transfer actually was made in contemplation of death, constitutes the taking of property without due process of law in contravention of the Constitution of the United States and is utterly null and void."

16. That thereafter, by letter dated April 8, 1933, mailed by registered mail to the plaintiff herein, the Commissioner of Internal
9 Revenue rejected said claim for refund of said deficiency with interest thereon resulting from the inclusion in the gross estate of the decedent of the property transferred as aforesaid, upon the ground that "in view of the decedent's right of revocation as to the income, and in view of the provision that the corpus of the funds shall revert to the decedent if he survive the beneficiary, so that the remainderman's interest depended entirely upon the decedent's death, the value of the entire fund is included in his gross estate in accordance with section 302 (c) (d) of the Revenue Act of 1926;"

17. That thereafter, on the 17th day of April, 1933, plaintiffs, duly filed with the defendant their claim in due form and properly executed for refund of said sum of $94,022.35, paid by the plaintiffs to defendant as aforesaid on June 30, 1931, and July 11, 1932, and as grounds for the allowance of their said claim alleged as follows:

"1. The said deficiency results from the erroneous action of the Commissioner of Internal Revenue in including in gross estate $994,195.00 representing the value of property transferred by decedent during his lifetime under four decelarations of trust.

"2. The transfers of said property were not made in contemplation of or intended to take effect in possession or enjoyment at or after the death of decedent.

"3. Section 302 (c) of the Revenue Act of 1926, insofar as the same provides that property transferred by a decedent within two years prior to death, shall be deemed to have been transferred in contemplation of death whether or not such transfer actually was made in contemplation of death constitutes a taking of property without due process of law, in contravention of the Constitution of the United States and is null and void.

"4. The enjoyment of the property transferred as aforesaid was not subject at the date of decedent's death to any change through the exercise of a power, either by the decedent alone or in conjunction with any other person, to alter amend or revoke.

"5. The property transferred as aforesaid constituted no part of the gross estate of the decedent under any of the provisions of section 302 of the Revenue Act of 1926 or under any other provisions of the Revenue Act of 1926 as in force at the date of decedent's death or as thereafter amended."

which said claim was rejected by the Commissioner on April 29, 1933.

10 18. That the transfer of the property under said declarations of trust made by decedent during his lifetime, as aforesaid, was not made by decedent in contemplaton of or intended to take effect in possession or enjoyment at or after decedent's death within the meaning of section 302 (c) of the Revenue Act of 1926, nor was the enjoyment of said property transferred, as aforesaid, subject at the date of decedent's death to any change through the exercise of a power by decedent to alter, amend or revoke within the meaning of section 302 (d) of the Revenue Act of 1926, and the value of said property constituted no part of the gross estate of decedent under any of the provisions of the Revenue Act of 1926;

19. That section 302 (c) of the Revenue Act of 1926, insofar as the same provides that property transferred by a decedent within two years prior to death shall be deemed to have been transferred in contemplation of death whether or not such transfer actually was made in contemplation of death, constitutes a taking of property without due process of law, in contravention of the constitution of the United States and is null and void;

20. That said determination of the Commissioner of Internal Revenue that the value of said property transferred by decedent during his lifetime, as aforesaid, should be included in the gross estate of decedent, was erroneous and illegal, and that the assessment of said sum of $94,022.35 against said estate as a deficiency in estate tax together with interest thereon, as a result of said determination, was excessive, erroneous and illegal, and that the collection by defendant from plaintiffs of said sum as such deficiency, together with interest thereon, was erroneous and illegal.

Wherefore, plaintiffs pray judgment against the defendant in the sum of $94,022.35 with interest on $22,190.40 of said sum from the 30th day of June, 1931, and with interest on the balance of said sum, to wit, the sum of $71,831.95, from the 11th day of July, 1932, and for their costs in this behalf expended.

RHODES E. CAVE,
THOMAS S. MCPHEETERS,
CRAWFORD JOHNSON,
Attorneys for Plaintiffs.

BRYAN, WILLIAMS, CAVE & MCPHEETERS,
Of Counsel.

11 [*Duly sworn to by Geo. G. Chase, jurat omitted in printing.*]

In United States District Court

Summons and Marshal's Return

(Filed May 2, 1933)

The President of the United States of America

To the Marshal of the----------*District of*----------
Greeting:

You are hereby commanded, that you summon Louis J. Becker, late of your district, if he may be found therein, so that he be and appear within twenty days after service of this summons before the United States District Court for the Eastern District of Missouri, at St. Louis, Mo., to pleatl, answer or demur to the petition of St. Louis Union Trust Co., a corp., and William Edwin Guy, executors of the estate of William Evans Guy, filed May 1, 1933.

And have you then and there this writ.

Returnable May 21, 1933.

Witness, the Honorable Charles B. Davis, United States District Judge at St. Louis, Mo., this 1st day of May, A. D. 1933.

[SEAL] JAS. J. O'CONNOR,
Clerk.

By RUBY BARHAM,
Deputy Clerk.

12 Marshal's return

UNITED STATES OF AMERICA,
Eastern Division of the
Eastern Judicial District of Missouri, ss:

I hereby certify that in St. Louis, Missouri, on the 2nd day of May, 1933, I executed the within writ, by delivering a true and correct copy of summons together with copy of Petition in this cause annexed, as furnished by the clerk to the within-named Louis J. Becker, personally.

T. W. HUKRIEDE,
U. S. Marshal.
By R. COLGAN,
Deputy.

Marshal's fees, $4.00.

[File endorsement omitted.]

In United States District Court

Answer

Filed Sept. 29, 1933

Now comes Louis J. Becker, the defendant, by Louis H. Breuer, United States attorney for the Eastern District of Missouri, Eastern Division, and files his answer to the petition heretofore filed by the plaintiffs.

1. Defendant admits the allegations in paragraph numbered 1 of plaintiffs' petition.

2. Defendant admits the allegations in paragraph numbered 2 of plaintiffs' petition.

3. Defendant admits the allegations in paragraph numbered 3 of plaintiffs' petition.

4. Defendant admits the allegations in paragraph numbered 4 of plaintiffs' petition.

5. Defendant admits the allegations in paragraph numbered 5 of plaintiffs' petition.

6. Defendant denies the allegations contained in paragraph numbered 6 of plaintiffs' petition.

7. Defendant admits the allegations contained in paragraph numbered 7 of plaintiffs' petition that on the 24th day of July, 1929, plaintiffs filed with the defendant a return for Federal estate tax of the said estate, showing a net estate subject to tax of $756,000.82, and further showing a total estate tax due of $34,860.05, against which sum plaintiffs claimed credit for estate, inheritance, legacy and succession taxes amounting to $27,888.04, and that the said plaintiffs paid to the defendant as and for the estate tax payable upon said net estate, the sum of $6,972.01. Defendant denies all other allegations contained in said paragraph 7.

8. Defendant denies the allegations contained in paragraph numbered 8 of plaintiffs' petition. Defendant, however, alleges that on January 3, 1921, the said William Evans Guy executed four separate declarations of trust. Defendant further alleges that the declaration of trust in which appears the name of his daughter Evelyn S. Guy, is correctly set forth in and made a part of paragraph 8 of plaintiffs' petition.

9. Defendant admits the allegations in paragraph numbered 9 of plaintiffs' petition.

10. Defendant denies the allegations contained in paragraph numbered 10 of plaintiffs' petition.

11. Defendant admits the allegations contained in paragraph numbered 11 of plaintiffs' petition that on January 3, 1921, the date of the execution of the aforesaid declarations of trust, the said William Evans Guy was just over seventy-six years of age, he having been born December 22, 1844.

As to all other allegations contained in said paragraph 11, defendant has no knowledge or information sufficient to form a belief, and therefore denies the same.

12. Defendant denies the allegations contained in paragraph numbered 12 of plaintiffs' petition. Defendant, however, alleges that the value of the property held under the declarations of trust had a value as of the date of decedent's death of $944,195.00. Defendant further alleges that such property was not transferred during the lifetime of the decedent, but that the transfer of said property occurred at and as a result of the decedent's death.

13. Defendant denies the allegations in paragraph numbered 13 of plaintiffs' petition. On the contrary, defendant alleges that the Commissioner of Internal Revenue determined that the value of the property held under the said declarations of trust should be included as a part of the decedent's statutory gross estate for estate tax purposes, for the reason that there had been no transfer of such property during the lifetime of the decedent; that such property was transferred at and as a result of the death of the decedent; and that such transfer was intended to take effect at or after the death of this decedent. Defendant further alleges that the Commissioner of Internal Revenue advised the plaintiffs of such determination with respect to said property.

14 14. Defendant denies the allegations contained in paragraph numbered 14 of plaintiffs' petition. Defendant, however, alleges that the plaintiffs paid Federal estate tax and interest thereon as follows:

July 24, 1929	$6,972.01
March 18, 1931	12.61
March 18, 1931 (interest)	3.74
June 30, 1931	21,263.73
June 30, 1931 (interest)	2,450.27
July 7, 1932	63,902.15
July 7, 1932 (interest)	7,857.34
July 7, 1932 (interest)	3,463.98
Total tax and interest paid	105,925.83

Defendant further alleges that on April 24, 1933, the Commissioner of Internal Revenue refunded to the plaintiffs the sum of $3,391.52, together with interest thereon in the sum of $143.46, or a total refund of $3,534.98, representing a portion of the above payments made by the plaintiffs on account of Federal estate taxes due from this estate.

15. Defendant admits the allegations contained in paragraph numbered 15 of plaintiffs' petition, with the exception of the allegation that the claim for refund therein referred to was "duly filed", which allegation the defendant denies.

16. Defendant admits the allegations contained in paragraph numbered 16 of plaintiffs' petition.

17. Defendant admits the allegations contained in paragraph numbered 17 of plaintiffs' petition, with the exception of the allegation that the plaintiffs "duly" filed their claim for refund, which allegation defendant denies.

18. Defendant denies each and every allegation contained in paragraph numbered 18 of plaintiffs' petition.

19. Defendant admits the allegations contained in paragraph numbered 19 of plaintiffs' petition.

20. Defendant denies each and every allegation contained in paragraph numbered 20 of plaintiffs' petition. On the contrary, defendant alleges that the transfer of the property held under the said declarations of trust did not take place during the lifetime of the decedent, but said transfer occurred at and as a result of the death of the decedent. Defendant further alleges that the said determination of the Commissioner of Internal Revenue that the value of said property so transferred should be included as a part of the decedent's statutory gross estate was proper, legal, and in accordance with the provisions of the Revenue Act of 1926. Defendant further alleges that the tax of $94,022.35 was properly, correctly, and lawfully assessed and collected from the estate of William Evans Guy, and was legally due and owing from the plaintiffs and was properly determined to be due in accordance with the laws of the United States and the regulations promulgated by the Treasury Department.

Wherefore, defendant, having fully answered, prays judgment against the plaintiffs, dismissing the petition herein with his costs.

LOUIS H. BREUER,
United States Attorney, Attorney for Defendant.

In United States District Court

Waiver of Jury Trial

Filed January 5, 1934

It is hereby stipulated and agreed between the parties to this cause that a jury trial shall be waived and that the cause shall be tried before a judge of this court without the aid or intervention of a jury.

RHODES E. CAVE,
THOMAS S. MCPHEETERS,
CRAWFORD JOHNSON,
Attorneys for Plaintiffs.
BRYAN, WILLIAMS, CAVE & MCPHEETERS,
Of Counsel.

LOUIS H. BREUER,
United States Attorney,
GEORGE C. DYER,
Assistant United States Attorney,
Attorneys for Defendant.

In United States District Court

Defendant's motion for judgment

Filed March 9, 1934

Comes now the defendant at the close of all the evidence in the case, and respectfully moves the court to find the issues herein
16 joined in favor of the defendant and against the plaintiff, and to enter a judgment for the defendant for the reason that under the law the defendant is entitled to a judgment.

HARRY C. BLANTON,
United States Attorney.
GEORGE C. DYER,
Assistant United States Attorney.

In United States District Court

Motion of plaintiffs for judgment in their favor

Filed May 18, 1934

Come now plaintiffs in the above entitled cause and move the court that judgment be entered in favor of the plaintiffs and against the defendant, as prayed in plaintiffs' petition, and, as grounds for said motion, say:

1. That the undisputed, uncontroverted and unambiguous evidence adduced by plaintiffs supports every allegation of plaintiffs'

petition not admitted by the pleadings or by stipulation and admits of no conclusion other than that plaintiffs are entitled to judgment.

2. That there is no evidence to support a finding or judgment in favor of the defendant.

3. That under the law plaintiffs are entitled to judgment.

RHODES E. CAVE,
THOMAS S. MCPHEETERS,
CRAWFORD JOHNSON,
Attorneys for Plaintiffs.
BRYAN, WILLIAMS, CAVE & MCPHEETERS,
Of Counsel.
DAVIS, J.

In United States District Court

Opinion, findings of fact and conclusions of law

Filed May 18, 1934

St. Louis Union Trust Company and William Edwin Guy, executors of estate of William Evans Guy, instituted this action to recover the sum of $94,022.25, and interest, being a portion of the Federal estate tax paid by the estate. The estate made a Federal estate tax return on July 24, 1929, showing a net estate of $758,000.82,
17 the tax on which amounted to $34,860.05, against which a credit for state inheritance tax of $27,888.04 was claimed, leaving a net tax of $6,972.01, which was paid. The audit of this return resulted in the addition to the gross estate the sum of 994,195, being the value of property held under four declarations of trust executed by the deceased on January 3, 1921. This resulted in the additional tax of $94,022.25 which was paid by the estate, and upon the claim for refund being rejected this suit was filed. The jury was waived and the cause submitted to the Court.

Findings of fact

1. That William Evans Guy, a resident of St. Louis, Mo., died on July 24, 1928, at the age of 84 years, leaving a last will and testament which was duly filed and admitted to probate in the probate court of the city of St. Louis, on July 30, 1928.

2. That the plaintiffs are the duly appointed and qualified executors of the estate of William Evans Guy.

3. That decedent, on January 3, 1921, executed four separate written declarations of trust, by the terms of which the decedent conveyed to himself as trustee for each trust certain bonds of a par value of $72,000, the aggregate value of said bonds being $288,000.

4. Decedent, at the time of the execution of the declarations of trust was 77 years of age, had retired from business many years prior thereto, but was active in the management of his personal invest-

ments; was under the care of a physician, for usual minor ailments, from 1917 to date of his death; was having periodic physical examinations made by the Life Extension Institute; was normally interested in longevity, and had many times stated that he expected to live to be ninety years of age.

5. That at the time of the creation of the said four trusts, the decedent was a widower, the father of four children, all of whom were then over the age of twenty-one years, and each of whom was made the sole beneficiary in one of the separate trusts.

6. That the decedent from time to time made additions to the securities held by each of the trusts, and at the time of his death the property held by the four trusts was of the aggregate value of $994.195.

7. That in the final audit of the Federal estate tax return
18 filed for the estate of the decedent, the Commissioner of Internal Revenue included as a part of the statutory gross estate of this decedent, the said sum of $994.195, as representing the value of property held by the decedent at the time of his death.

8. That the four declarations of trust executed on January 3, 1921, were identical in form and provision, with the exception of the name of the party for whose benefit the trust was created. The declaration of trust for Evelyn S. Guy, which is set out in paragraph 8 of the petition, is typical of all, and is as follows:

"I, William Evans Guy, of the city of St. Louis, and State of Missouri, hereby declare, this third day of January, 1921, that I hold in trust for my daughter, Evelyn S. Guy, the following property, to wit:

"Sixty thousand dollars ($60,000.00) in par value of the five per-cent-income bonds of the New Orleans, Texas and Mexico Ry. Co., with coupons maturing April 21, 1921, and subsequently attached: also twelve thousand dollars ($12,000) in par value of the St. Louis Union Trust Company's five-per-cent certificates of the Annuity Realty Company; with the powers and for the uses and purposes hereinafter set forth as follows:

"1. I am to have the power at any time, and from time to time, to sell, any of the trust property or estate, for such price and prices as I may determine; any money coming into my hands as the proceeds of any such sale or otherwise and forming a part of the principal of said trust estate shall as soon as practicable, be reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted to the purchase of such property as is ordinarily deemed advisable for trust property. I am likewise to have the power to rent or lease any and all real estate which may be included in said trust property for terms of any duration, whether such terms shall extend to a time beyond the termination of this trust or not. I am likewise to have full power and authority in my discretion to borrow money and secure the sums so borrowed by

pledge or mortgage of any and all portions of said trust estate and I may out of the corpus or income of said trust estate, or out of both such corpus and income repay the sum so borrowed, I am to have full authority to invest or reinvest any sums so borrowed; and to collect and receive the rents, income and profits arising from
19 the trust estate therein created. It being my intention to retain as trustee such rights, power, and authority in respect to the management, control, and disposition of said trust estate for the use and benefit of the beneficiary, as I have with respect to property absolutely owned by me.

"2. Out of the income and revenue accruing from said trust estate I shall have power to pay all taxes, expenses necessarily or properly incident to its care, preservation and management; and all other reasonable or necessary charges incident to the administration of the trust created hereby, and out of the remaining income and revenue, I am to pay the beneficiary of this trust an allowance of $300.00 a month, with power in my discretion from time to time to increase or decrease the said allowance whenever I may deem it to be to the best interest of the said beneficiary, to have such allowance increased or decreased, I shall have the power, from time to time, out of the remainder of said income and revenue, to appropriate and pay such sums as I may deem reasonably necessary for the maintenance, support, and education of said beneficiary. Any income not distributed as hereinabove provided shall be added to the principal of the trust estate.

"3. In case of an emergency, or illness of said beneficiary, requiring a greater sum than that accruing as income or revenue, I shall have power to use as much of the principal of said trust estate as may be absolutely necessary.

"4. Any receipt given by the beneficiary of this trust to me for any sum paid to her by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

"5. The foregoing provisions for my said daughter, Evelyn S. Guy, shall be for her sole and separate use, free from all statutory and marital rights of her husband; and free from her debts and without the right on her part to assign, pledge, hypothecate, or anticipate, or in any way create a lien upon any of the income or corpus of the trust estate hereby created before she shall receive the same, nor shall any of the said income or corpus be subject to any claims of any persons who may be at any time creditors of my said daughter.

"6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease."

"(Signed) WILLIAM EVANS GUY.

Witness:

"WM. EDWIN GUY."

9. That upon the execution of said declaration of trust the said William Evans Guy undertook the performance of the duties of trustee thereunder and continued to perform said duties until the time of his death. He exercised complete and sole control of the properties held by the trust and accounted to the separate trusts for the income on the property held by each; and made payments from the income to the separate beneficiaries from time to time as provided in the declarations of trust, exercising the authority therein reserved to the trustor.

10. That by the terms of the declarations of trust the trustor had the same management and control of the securities in the trust after as before the execution of the said instruments of writing.

11. That the trustor was, as trustee, vested with discretion to make such payments from the income of the trust property to the beneficiaries as he saw fit.

12. That the property in any one or all of said trusts would have reverted to the trustor in the event of the death of the named beneficiary prior to the death of decedent.

13. That none of the beneficiaries named in the trust instruments acquired custody, control or title to the property held in trust until the death of the trustor.

14. That title to the beneficiaries was contingent upon their survival of the decedent.

15. That the motive of decedent in creating the trusts was to decrease his income tax, by distributing a portion of his property among the four trusts, thus avoiding the high rate for large incomes, and, at the same time to make provision for the distribution of the property to his children at decedent's death.

Conclusions of law

1. That the property constituting the corpus of the four trusts was property of which the decedent made a transfer in contemplation of death.

2. That the property constituting the corpus of the four trusts was property of which the decedent made a transfer intending it to take effect in possession and enjoyment at and after his death.

3. The transfer made by the decedent was intended as a substitute for a testamentary disposition of the corpus of the trusts.

4. That the sum of $994,195 was properly included in the statutory gross estate of the decedent.

5. That defendant's motion for judgment at the close of all the evidence should be sustained.

CHARLES B. DAVIS,
U. S. District Judge.

In United States District Court

10388

ST. LOUIS UNION TRUST COMPANY, A CORP., AND WILLIAM EDWIN Guy, executors of the Estate of William Evans Guy, plaintiffs

vs.

LOUIS J. BECKER, COLLECTOR OF INTERNAL REVENUE, DEFENDANT

Judgment

May 18, 1934

Now upon motion of plaintiff, it is ordered that judgment heretofore entered herein as well as memorandum of the court, findings of fact and conclusions of law, order sustaining defendant's motion for judgment and also submission of cause on the merits, be and are hereby set aside.

And now motion of plaintiffs for judgment in their favor as well as said plaintiffs' request for declarations of law are filed by leave and submitted to the court. Whereupon said requests for declaration of law are by the court refused, to which action of the court an exception is allowed plaintiffs.

And now the court having duly considered motion of plaintiffs for judgment in their favor, doth order that said motion be and is hereby overruled, to which ruling of the court plaintiffs are also allowed an exception. Whereupon the issues herein joined are resubmitted to the court on testimony adduced on former trial of cause.

And now memorandum of the court, as well as findings of fact and conclusions of law are filed herein finding issues in favor of defendant and against plaintiffs. And the court having duly considered motion of defendant for judgment in his favor, doth order that such motion be and is hereby sustained, to which ruling an exception is allowed plaintiffs.

It is therefore, pursuant to the aforesaid finding of the court, ordered and adjudged that plaintiffs, St. Louis Union
22 Trust Company, a corporation, and William Edwin Guy, executors of the estate of William Evans Guy, take nothing by their suit in this behalf against defendant Louis J. Becker, and that said defendant go hence without day and recover of said plaintiffs his costs and charges herein expended for all of which costs and charges let execution issue upon praecipe filed therefor by said defendant.

In United States District Court

Notice of appeal

Filed July 6, 1934

To Louis J. Becker, Defendant in the above-entitled cause, and Mr. Harry C. Blanton, United States Attorney, and Mr. George C. Dyer, Assistant United States Attorney, his Attorneys of Record in Said Cause:

You and each of you are hereby notified that the St. Louis Union Trust Company, a corporation, and William Edwin Guy, Executors of the Estate of William Evans Guy, Deceased, plaintiffs and appellants in the above entitled cause, appeal to the United States Circuit Court of Appeals, Eighth Circuit, from the judgment heretofore rendered in said cause against the plaintiffs on the 18th day of May, 1934, for the reasons set forth in the assignment of errors filed herewith.

ST. LOUIS UNION TRUST COMPANY, and
WILLIAM EDWIN GUY,
Executors of the Estate of William Evans Guy, Deceased,

By RHODES E. CAVE,
THOMAS S. MCPHEETERS,
CRAWFORD JOHNSON,
Their Attorneys.

BRYAN, WILLIAMS, CAVE & MCPHEETERS,
Of Counsel.

Receipt of copy of the foregoing notice of appeal is hereby acknowledged this 6th day of July, 1934.

LOUIS J. BECKER,
By HARRY C. BLANTON,
United States Attorney.
GEO. C. DYER,
Assistant United States Attorney.
His Attorneys by H. C. B.

23 In United States District Court

Petition for appeal

Filed July 6, 1934.

To the Honorable CHARLES B. DAVIS,
Judge of the United States District Court:

Your petitioners, who are plaintiffs in the above-entitled cause, pray that they may be permitted to take an appeal from the judgment entered in said cause on the 18th day of May 1934 to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the Assignment of Errors which is filed herewith.

And these plaintiffs pray that their appeal herein be allowed and that a transcript of the record, proceedings and documents upon which the judgment herein is based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Eighth Judicial Circuit under the law and under the rules of said court in such cases made and provided.

And your petitioners further pray that the proper order relating to the security required by them be made and entered herein.

ST. LOUIS UNION TRUST COMPANY,
A corporation.
WILLIAM EDWIN GUY,
Executors of the Estate of William Evans Guy, deceased.
By RHODES E. CAVE,
THOMAS S. MCPHEETERS,
CRAWFORD JOHNSON,
Their attorneys.
BRYAN, WILLIAMS, CAVE & MCPHEETERS,
Of counsel.

In United States District Court

Assignment of errors

Filed July 6, 1934

Now come St. Louis Union Trust Company, a corporation, and William Edwin Guy, executors of the estate of William Evans Guy, deceased, plaintiffs in the above-entitled cause, by their attorneys, and file the following Assignment of Errors upon which they will rely in the prosecution of the appeal herewith petitioned for in said cause from the judgment of this court entered on the 18th day of May 1934 in the above-entitled cause in the following particulars, to wit:

24 First assignment of error

The court erred in refusing to give the declaration of law requested by plaintiffs, as follows:

"The court declares the law to be that under the pleadings [and] admitted and the uncontroverted and undisputed evidence adduced by plaintiffs as to facts not admitted by the pleadings or agreement of the parties, plaintiffs are entitled to judgment."

Second assignment of error

The court erred in overruling plaintiffs' motion for judgment in their favor, which said motion was in words and figures, as follows (omitting caption and signatures):

"Come now plaintiffs in the above-entitled cause and move the court that judgment be entered in favor of plaintiffs and against the defendant, as prayed in said petition, and, as grounds for said motion, say:

"1. That the undisputed, uncontroverted and unambiguous evidence adduced by plaintiffs supports every allegation of plaintiffs' petition not admitted by the pleadings or by the stipulation, and admits of no conclusion other than that plaintiffs are entitled to judgment.

"2. That there is no evidence to support a finding or judgment in favor of the defendant.

"3. That under the law plaintiffs are entitled to judgment."

Third assignment of error

The court erred in sustaining defendant's motion for judgment in his favor, which said motion was in words and figures as follows (omitting caption and signature):

"Comes now the defendant at the close of all the evidence in the case and respectfully moves the court to find the issues herein joined in favor of the defendant and against the plaintiffs, and to enter judgment for the defendant for the reason that under the law the defendant is entitled to judgment."

Fourth assignment of error

The court erred in making its findings of fact numbered 4, 5, 7, 10, 13, and 15, respectively, for the reason that said findings are not supported by and are contrary to the pleadings and the undisputed evidence in the case.

Fifth assignment of error

The court erred in finding the issues and entering judgment
25 in favor of defendant and against plaintiffs for the reason that the facts found by the court are insufficient to support said finding and judgment.

Sixth assignment of error

The court erred in finding the issues and entering judgment in favor of defendant and against plaintiffs for the reason that upon the facts found by the court plaintiffs are entitled to judgment in their favor and against defendant.

Seventh assignment of error

The court erred in concluding, as a matter of law, that the property constituting the corpus of the four trusts was property of which the decedent made a transfer in contemplation of death.

Eighth assignment of error

The court erred in concluding, as a matter of law, that the property constituting the corpus of the four trusts was property of which

the decedent made a transfer intending it to take effect in possession and enjoyment at and after his death.

Ninth assignment of error

The court erred in concluding, as a matter of law, that the transfer made by decedent was intended as a substitute for testamentary disposition of the corpus of the trusts.

Tenth assignment of error

The court erred in concluding, as a matter of law, that the sum of $994,195.00 was properly included in the statutory gross estate of the decedent.

Wherefore, plaintiffs pray that the said judgment may be reversed and for such other and further relief as to the court may seem just and proper.

Dated July 6, 1934.

RHODES E. CAVE,
THOMAS S. MCPHEETERS,
CRAWFORD JOHNSON,
Attorneys for Plaintiffs.
BRYAN, WILLIAMS, CAVE & MCPHEETERS,
Of Counsel.

In United States District Court

Order allowing appeal

Filed July 6, 1934

Plaintiffs having filed their assignment of errors, petition for appeal, notice of appeal with service thereof, and their appeal bond in the sum of five hundred dollars:

26 It is thereupon ordered that said plaintiffs be and are hereby allowed an appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the judgment entered on May 18, 1934, in the case of St. Louis Union Trust Company, a corporation, and William Edwin Guy, Executors of the Estate of William Evans Guy, Deceased, plaintiff, vs. Louis J. Becker, Defendant, No. 10,388; that said appeal bond be and the same is hereby approved and that the Clerk certify a transcript of the record to said United States Circuit Court of Appeals for the Eighth Circuit, as required by the statutes and rules of said court.

Done at St. Louis, Missouri, this 6 day of July, 1934.

CHARLES B. DAVIS.
United States District Judge.

[Bond on appeal for $500.00 approved and filed July 6, 1934, omitted in printing.]

27 In United States District Court

Election as to printing of record

Filed July 9, 1934

Come now St. Louis Union Trust Company, a corporation, and William Edwin Guy, Executors of the estate of William Evans Guy, deceased, plaintiffs and appellants in the above entitled
28 cause, by their attorneys, and elect to waive printing of the record in this cause under the provisions of section 865, title 28, United States Code.

ST. LOUIS UNION TRUST COMPANY, and
WILLIAM EDWIN GUY,
Executors of the Estate of William Evans Guy, Deceased.
By RHODES E. CAVE,
THOMAS S. McPHEETERS,
CRAWFORD JOHNSON,
Their Attorneys.
BRYAN, WILLIAMS, CAVE & McPHEETERS,
Of Counsel.

In United States District Court

Stipulation as to contents of transcript of record

Filed July 9, 1934

It is hereby stipulated and agreed by and between the attorneys for the respective parties that the transcript of the record to be sent to the United States Circuit Court of Appeals for the Eighth Circuit pursuant to the appeal heretofore allowed herein shall include the following:

1. Citation and acceptance of service;
2. Notice of appeal and acknowledgment of service;
3. Petition for appeal;
4. Assignments of errors;
5. Order allowing appeal;
6. Plaintiffs' appeal bond;
7. Election to waive act of Congress as to printing of record;
8. Plaintiffs' petition;
9. Summons and marshal's return;
10. Defendant's answer;
11. Stipulation waiving jury trial;
12. Bill of exceptions and all exhibits called for and mentioned therein;
13. Declaration of law offered by plaintiffs and order refusing the same;

29 14. Plaintiffs' motion for judgment in their favor, and order overruling the same;

15. Defendant's motion for judgment in his favor, and order sustaining the same;

16. Memorandum of the court containing its findings of fact and conclusions of law;
17. Final judgment;
18. This stipulation.

RHODES E. CAVE,
THOMAS S. MCPHEETERS,
CRAWFORD JOHNSON,
Attorneys for Appellants.
BRYAN, WILLIAMS, CAVE & MCPHEETERS,
Of Counsel.
HARRY C. BLANTON,
United States Attorney,
GEORGE C. DYER,
Assistant United States Attorney,
Attorneys for Appellee.

In United States District Court

Bill of exceptions

Filed July 9, 1934

Be it remembered that upon the trial of this cause at the September term, A. D. 1933, in the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri on the 8th day of January, A. D. 1934 before Honorable Charles B. Davis, District Judge, the following proceedings were had:

Appearances: For plaintiffs: Thomas S. McPheeters, Esq., Crawford Johnson, Esq.

Bryan, Williams, Cave & McPheeters, Of Counsel.

For defendant: George C. Dyer, Esq.

Jury was waived by stipulation heretofore filed in this court, to wit, on January 5, 1934, said stipulation being in words and figures as follows (omitting formal caption):

Stipulation waiving jury

30 It is hereby stipulated and agreed by and between the parties to this cause that a jury trial shall be waived and that the cause shall be tried before the court without the aid or intervention of a jury.

RHODES E. CAVE,
THOMAS S. MCPHEETERS,
CRAWFORD JOHNSON,
Attorneys for Plaintiffs.
BRYAN, WILLIAMS, CAVE & MCPHEETERS,
Of Counsel.
LOUIS J. BREUER,
United States Attorney.
GEORGE C. DYER,
Assistant United States Attorney,
Attorneys for Defendant.

Thereupon the plaintiffs, to sustain the issues in their behalf, offered the following evidence:

WILLIAM EDWIN GUY, plaintiff, of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiffs, as follows:

Direct examination

My name is William Edwin Guy. My residence is St. Louis, Missouri. I am at present at Princeton, New Jersey. I am one of the executors of the estate of William Evans Guy who was my father.

The witness thereupon identified plaintiffs' exhibits 1, 2, 3, and 4, as four declarations of trust executed by William Evans Guy on January 3, 1921, for the benefit respectively of William Edwin Guy, David Wade Guy, Katherine Guy Fenimore Cooper, and Evelyn S. Guy and identified the long-hand notations appearing on said exhibits as being either wholly in his father's handwriting or subscribed by his father's signature. Said exhibits were offered in evidence by plaintiff and received without objection and by leave of court, no objection being made, said exhibits were withdrawn and plaintiffs substituted in lieu thereof photostatic copies numbered plaintiffs' exhibits 1-A, 2-A, 3-A, and 4-A.

63 I was a practicing attorney in January 1921 and assisted my father in the preparation of these instruments. I was residing in St. Louis at my father's home at that time. I am not positive whether my sister Mrs. Cooper was residing in this city or in the East at that time. If she was living in St. Louis she was living with her husband in a separate household and not in my father's house. My sister Evelyn was at that time residing in my father's household when she was in St. Louis, and my brother David was attending the Massachusetts Institute of Technology.

I assisted my father in the management of those trusts, in taking care of the securities, and taking them in and out of the box when they were put in or taken out for sale or when new securities were put in. Until 1927 I was present, I believe, on every occasion on which the box in which these trust securities were kept was opened. My brother and sisters were advised of the execution of these declarations of trust shortly after they were executed, and I believe they were furnished with copies of the trust instruments.

My father kept books of the affairs of the trust. The small, leather-covered memorandum book, which you have handed me, is a pocket memorandum book for the calendar years 1927 and 1928, which my father carried with him constantly, and made all his notations and kept all his accounts in. The notations in the first part are a diary and the accounts are his own private accounts, and then there are pages of accounts as trustee in account with children.

The four other similar, leather-covered memorandum books, which you hand me, are substantially the same thing. The calendar years 1919 and 1920 are included in the first of these pocket notebooks.

DECLARATION OF TRUST FOR WM. EDWIN GUY.

I, William Evans Guy, of the City of St. Louis, and State of Missouri, Hereby declare, this third day of January, 1921, that I hold in trust for my son, Wm. Edwin Guy, the following property, to wit:-

Sixty Thousand Dollars ($60,000.00) in par value of the five percent Income Bonds of the New Orleans, Texas & Mexico Railway Company, with coupons maturing April 21, 1921, and subsequently attached; also Twelve Thousand Dollars ($12,000.00) in par value of the St. Louis Union Trust Company's five percent certificates of the Annuity Realty Company;

with the powers and for the uses and purposes hereinafter set forth; as follows:-

1. I am to have the power at any time, and from time to time, to sell any of the trust property or estate, for such price and prices as I may determine. Any money coming into my hands as the proceeds of any such sale or otherwise and forming a part of the principal of said trust estate shall as soon as practicable, be reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted

In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted to the purchase of such property as is ordinarily deemed advisable for trust property. I am likewise to have the power to rent or lease any and all real estate which may be included in said trust property for terms of any duration, whether such terms shall extend to a time beyond the termination of this trust or not. I am likewise to have full power and authority in my discretion to borrow money and secure the sums so borrowed by pledge or mortgage of any and all portions of said trust estate and I may out of the corpus or income of said trust estate, or out of both such corpus and income repay the sums so borrowed. I am to have full authority to invest or reinvest any sums so borrowed; and to collect and receive the rents, income and profits arising from the trust estate therein created. It being my intention to retain as trustee such rights, power and authority in respect to the management, control and disposition of said trust estate for the use and benefit of the beneficiary, as I have with respect to property absolutely owned by me.

2. Out of the income and revenue accruing from said trust estate I shall have power to pay all taxes, expenses necessarily or properly incident to its care, preservation and management; and all other reasonable or necessary charges incident to the administration of the

Plaintiffs' Exhibit 1-31

trust created hereby, and out of the remaining income and revenue I am to pay the beneficiary of this trust an allowance of $300.00/100 a month, with power in my discretion from time to time to increase or decrease the said allowance whenever I may deem it to be to the best interest of the said beneficiary, to have such allowance increased or decreased, I shall have power, from time to time, out of the remainder of said income and revenue, to appropriate and pay such sums as I may deem reasonably necessary for the maintenance, support and education of said beneficiary. Any income not distributed as hereinabove provided shall be added to the principal of the trust estate.

3. In case of an emergency, or illness of said beneficiary, requiring a greater sum than that accruing as income or revenue, I shall have power to use as much of the principal of said trust estate as may be absolutely necessary.

4. Any receipt given by the beneficiary of this trust to me for any sum paid to him by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

5. My said son Wm. Edwin Guy, shall have no right to assign,

4. Any receipt given by the beneficiary of this trust to me for any sum paid to him by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

5. My said son, Wm. Edwin Guy, shall have no right to assign, pledge, hypothecate, anticipate or in any way create a lien upon any of the income or corpus of the trust estate hereby created before he received the same, nor shall any of the said income or corpus be subject to any claims of any persons who may at any time be creditors of my said son.

6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before him death, then this property shall thereupon become his immediately and absolutely and be turned over to him and in either case this trust shall cease immediately.

William Evans Guy

Witness:
Wm Edwin Guy

January 2, 1922. Added to the above Trust Fund, subject to the same terms and conditions the following property:
Two thousand five hundred ($2500) in par value of the five percent Income Bonds of the Missouri, Kansas Texas Railway Company, with coupons No. 11 and subsequently attached; also Five Hundred Dollars ($500) in par value of the St. Louis Union Trust Company five per cent certificates of the Annuity Realty Company. William Evans Guy

November 9, 1922. Added to the above Trust Fund, subject to the same Terms and conditions, the following property:

Five thousand Dollars ($5000.00/100) in par value of the Five (5) per cent Income Bonds of the New Orleans, Texas and Mexico Railway Company, with coupons No. 13 and subsequently attached. ——— (Not endorsed)

William Evans Guy

Witness:
W. Dixon Guy

January 1, 1923. Added to the above Trust Fund, subject to the same Terms and Conditions, the following property:

An undivided ½ interest in 500 shares Preferred Stock American Investment Securities Company, par value $100.00 per share, evidenced by Certificate No. B42 in name of William Evans Guy, indorsed in blank.

An undivided ½ interest in 50 shares Preferred Stock [illegible] Manufacturing Company, par value [illegible] per share, evidenced by Certificate No. [illegible] in name of William Evans Guy, indorsed in

[redacted] No.
[redacted] indorsed on
[redacted]

William Evans Gray

Witness:
Wm Edwin Gray

Dec. 21st 1923. Added to the above Trust Fund, subject to the same terms and conditions the following property:
$17500 in par value of St. Louis - San Francisco Railway Co. Adjustment 6% Bonds, with coupons maturing April 1st 1924 and subsequently attached

William Evans Gray

Witness:
Wm Edwin Gray

April 1, 1924 Withdrawn from above Trust Fund [illegible] and stock Olive Z. Mfg. Co. in which interest [illegible] Trust Fund is an undivided ¼ interest and substituted and added, subject to same terms and conditions.
An undivided ¼ interest in $5000 par value of 5% Pan American Petroleum Co. with coupons maturing July 1st 1924
Mortgage Bonds of [illegible] Co. [illegible]
and [illegible] attached
An undivided ¼ interest in $5000 par value Toledo Steel Co. stock, as indicated by Order No. 1125 in estate of W. E. Gray, indorsed in Clerk

William Evans Gray

Witness:
Wm Edwin Gray

Jan. 1st 1926 - Added to the above Trust Fund, subject to the same terms and conditions the following property:
An undivided [illegible] interest in Morocco in par value 15 year 7% notes of Mo. Pacific Ry. Co. given for purchase of stock of K.O. I. & M. Railway Co. with said stock attached as collateral and all held now by G.H. Walker & Co in New York. Said notes bearing 7% interest payable June 2 and December 2nd

Wm E. Gray

Witness:
Wm Edwin Gray

35

April 1st 1921 added to the above Trust Fund, subject to the same terms and conditions, the following property:
One undivided one fourth (1/4) interest in 400 shares Missouri Pacific 5% Preferred Stock, par value $100.
One undivided one fourth (1/4) interest in 400 shares Sugar Estates of Oriente Preferred Stock, par value $100.
Witness:
Wm. Edwin Guy.

Wm. G. Guy

Dec. 1921 sold, charges allowed $110,000

Dec. 20 1927. Added to the above Trust Fund & subject to the same terms & conditions

One undivided 1/4 interest in 400 shares A.T. & S.F. Ry Com
One undivided 1/4 interest in $2000 St. L. & S.F. R.R. 6% bonds

Witness
James Dunn

Wm G. Guy

DECLARATION OF TRUST FORAVID WADE GUY.

I, William Evans Guy, of the Cityf St. Louis, and State of Missouri, hereby declare, this third day January, 1921, that I hold in trust for my son, David Wade Guy, the following property, to wit:-

Sixty Thousand Dollars ($60,000.0 in par value of the five percent Income Bonds of the New Orleans, Texas & Mexico Railway Company, with coupons maturing April 21, 921, and subsequently attached; also Twelve Thousand Dollars ($2,000.00) in par value of the St. Louis Union Trust Company's five ercent certificates of the Annuity Realty Company;

with the powers and for the uses nd purposes hereinafter set forth; as follows:

1. I am to have the power at any time, and from time to time, to sell any of the trust property or estate, for such price and prices as I may determine. Any money coming into my hands as the proceeds of any such sale or otherwise and forming a part of the principal of said trust estate shall as soon as practicable, be reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire

said trust estate shall as soon as practicable, be reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted to the purchase of such property as is ordinarily deemed advisable for trust property. I am likewise to have the power to rent or lease any and all real estate which may be included in said trust property for terms of any duration, whether such terms shall extend to a time beyond the termination of this trust or not. I am likewise to have full power and authority in my discretion to borrow money and secure the sums so borrowed by pledge or mortgage of any and all portions of said trust estate and I may out of the corpus or income of said trust estate, or out of both such corpus and income repay the sums so borrowed. I am to have full authority to invest or reinvest any sums so borrowed; and to collect and receive the rents, income and profits arising from the trust estate therein created. It being my intention to retain as trustee such rights, power and authority in respect to the management, control and disposition of said trust estate for the use and benefit of the beneficiary, as I have with respect to property absolutely owned by me.

2. Out of the income and revenue accruing from said trust estate I shall have power to pay all taxes, expenses necessarily or properly incident to its care, preservation and management; and all other reasonable or necessary charges incident to the administration of the

Plaintiffs' Exhibit 2. 36

trust created hereby, and out of the remaining income and revenue I am to pay the beneficiary of this trust an allowance of $ [illegible] a month, with power in my discretion from time to time to increase or decrease the said allowance whenever I may deem it to be to the best interest of the said beneficiary, to have such allowance increased or decreased, I shall have power, from time to time, out of the remainder of said income and revenue, to appropriate and pay such sums as I may deem reasonably necessary for the maintenance, support and education of said beneficiary. Any income not distributed as hereinabove provided shall be added to the principal of the trust estate.

3. In case of an emergency, or illness of said beneficiary, requiring a greater sum than that accruing as income or revenue, I shall have power to use as much of the principal of said trust estate as may be absolutely necessary.

4. Any receipt given by the beneficiary of this trust to me for any sum paid to him by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

any sum paid to him by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

b. My said son, David Wade Guy, shall have no right to assign, pledge, hypothecate, anticipate or in any way create a lien upon any of the income or corpus of the trust estate hereby created before he received the same, nor shall any of the said income or corpus be subject to any claims of any persons who may at any time be creditors of my said son.

6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before him death, then this property shall thereupon become his immediately and absolutely and be turned over to him and in either case this trust shall cease immediately.

William Evans Guy

Witness:

Wm Edwin Guy

January 2, 1922 added to the above Trust fund, subject to the same terms and conditions, the following property:

Two thousand five hundred dollars ($2,500.00) in par value of the five per cent Income Bonds of the New Orleans, Texas & Mexico Railway Company, with coupons No. 11 and subsequently attached; also five Hundred dollars ($500) in par value of the St. Louis Union Trust Company's five per cent certificates of the Annuity Realty Company

Witness:

Wm Edwin Guy

William Evans Guy

sold & surrendered

Sold & Reinvested

November 9, 1922. Added to the above Trust Fund, subject to the same terms and conditions, the following property:

Five Thousand ($5000) Dollars in par value of the Five (5) per cent Income Bonds of the New Orleans, Texas and Mexico Railway Company with Coupons No. 13 and subsequently attached. ——— William Evans Guy

Witness:
Wm Edwin Guy

January 1, 1923. Added to the above Trust Fund, subject to the same terms and conditions, the following property:

An undivided 1/4 interest in 500 shares Preferred Stock American Investment Securities Company, par value $10.00 per share, as evidenced by Certificate No. 642, in the name of William Evans Guy indorsed in blank.

Witness
Wm Edwin Guy

An undivided 1/4 interest in 50 shares Preferred Stock Oliver Electric &

Manufacturing Company, par value $100.00 per share, evidenced by certificates No. 5, 20, and 35, in the name of William E. Guy indorsed in blank -

Witness:
Wm Edwin Guy

William Evans Guy

December 21st 1923 Added to the above Trust fund, subject to the same terms and conditions, the following property:

$17,500 in par value of the St. Louis-San Francisco Railway Co. Adjustment 6% Bonds, with coupons maturing April 1st 1924 and subsequently attached.

Witness:
Wm Edwin Guy

William Evans Guy

April 1, 1924. Withdrawn from above trust fund 50 shares pfd stock of Mfg Co. pfd stock (undivided interest of this beneficiary 1/4) and substituted and added, subject to the same terms and conditions:

An undivided 1/4 interest in $50,000 par value of 5% Leinian Series B Mortgage Bonds of St. Louis-San Francisco Railway Co., with coupons maturing July 1st 1924 and subsequently attached.

An undivided 1/4 interest in $50000 par value Laclede Steel Co. stock as evidenced by Cert. No. A 123 for 500 shares in name of Wm E. Guy, indorsed in blank

Witness:
Wm Edwin Guy

William Evans Guy

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Jan. 1st 1925 Added to the above Trust Fund, subject to the same terms and conditions, the following property:

An undivided one fourth (1/4) interest in $80,000. in par value 7% 15 year notes of No. Pacific Railway Co. given for purchase of stock of New Orleans Texas and Mexico Ry. Co. with said stock attached as collateral and all held now by G. N. Walbridge in New York. said notes bearing 7% interest payable June 2 and December 2nd

Wm. E. Guy

Witness:
Wm. Edwin Guy.

April 1st 1927 Added to the above Trust Fund, subject to the same terms and conditions the following property

An undivided one fourth (1/4) interest in 1000 shares Missouri Pacific 5% preferred stock, par value $100.

An undivided one fourth (1/4) interest in 400 shares Sugar Estates of Oriente Preferred stock, par value $100.00

Wm. E. Guy

Witness:
Wm. Edwin Guy.

Dec. 20. 1927. added to the above Trust Fund & subject to the same terms & conditions:

An undivided 1/4 interest in 400 shares A.T. & T. Co. Com
An undivided 1/4 " " $2000 G.L. & S.F. Adj. 6% bonds

Wm. E. Guy

Witness

DECLARATION OF TRUST FOR KATHERINE [redacted] Kenmore Guy Cooper.

I, William Evans Guy, of the City of St. Louis, and State of Missouri, hereby declare, this third day of January, 1921, that I hold in trust for my daughter, Katherine L. Guy Cooper, the following property, to wit:

Sixty Thousand Dollars ($60,000.00) in par value of the five percent Income Bonds of the New Orleans, Texas & Mexico Railway Company, with coupons maturing April 21, 1921, and subsequently attached; also Twelve Thousand Dollars ($12,000.00) in par value of the St. Louis Union Trust Company's five percent certificates of the Annuity Realty Company;

with the powers and for the uses and purposes hereinafter set forth, as follows:

1. I am to have the power at any time, and from time to time, to sell any of the trust property or estate, for such price and prices as I may determine. Any money coming into my hands as the proceeds of any such sale or otherwise and forming a part of the principal of said trust estate shall as soon as practicable, be reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted to the purchase of such property as is ordinarily deemed advisable

said trust estate shall as soon as practicable, be reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted to the purchase of such property as is ordinarily deemed advisable for trust property. I am likewise to have the power to rent or lease any and all real estate which may be included in said trust property for terms of any duration, whether such terms shall extend to a time beyond the termination of this trust or not. I am likewise to have full power and authority in my discretion to borrow money and secure the sums so borrowed by pledge or mortgage of any and all portions of said trust estate and I may out of the corpus or income of said trust estate, or out of both such corpus and income repay the sums so borrowed. I am to have full authority to invest or reinvest any sums so borrowed; and to collect and receive the rents, income and profits arising from the trust estate therein created. It being my intention to retain as trustee such rights, power and authority in respect to the management, control and disposition of said trust estate for the use and benefit of the beneficiary, as I have with respect to property absolutely owned by me.

2. Out of the income and revenue accruing from said trust estate I shall have power to pay all taxes, expenses necessarily or properly incident to its care, preservation and management; and all other reasonable or necessary charges incident to the administration of the

Plaintiffs' Exhibit 3.

trust created hereby, and out of the remaining income and revenue, I am to pay the beneficiary of this trust an allowance of $300 00/100 a month, with power in my discretion from time to time to increase or decrease the said allowance whenever I may deem it to be to the best interest of the said beneficiary, to have such allowance increased or decreased, I shall have the power, from time to time, out of the remainder of said income and revenue, to appropriate and pay such sums as I may deem reasonably necessary for the maintenance, support and education of said beneficiary. Any income not distributed as hereinabove provided shall be added to the principal of the trust estate.

3. In case of an emergency, or illness of said beneficiary, requiring a greater sum than that accruing as income or revenue, I shall have power to use as much of the principal of said trust estate as may be absolutely necessary.

4. Any receipt given by the beneficiary of this trust to me for

shall have power to use as much of the principal of said trust estate as may be absolutely necessary.

4. Any receipt given by the beneficiary of this trust to me for any sum paid to her by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

5. The foregoing provision for my said daughter Katherine L. Guy Cooper, shall be for her sole and separate use, free from all statutory and marital rights of her husband; and free from her debts and without the right on her part to assign, pledge, hypothecate, or anticipate, or in any way create a lien upon any of the income or corpus of thr trust estate hereby created before she shall receive the same, nor shall any of the said income or corpus be subject to any claims of any persons who may or any time be creditors of my said daughter.

6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease immediately. Interlineations & correction to Katherine L. Guy Cooper made before signing

William Evans Guy

Witness
Wm Edwin Guy

(over)

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January 2nd, 1922. Added to the above Trust Fund, subject to the same terms and conditions, the following property:

Two thousand five hundred dollars ($2500.00) in par value of the five per cent Income Bonds of the New Orleans, Texas and Mexico Railway Company with coupons No. 11 and subsequently attached; also Five Hundred Dollars ($500.00) in par value of the St. Louis Union Trust Company's five per cent certificates of the Annuity Realty Company.

William Evans Guy

Witness:
Wm Edwin Guy

November 9, 1922 Added to the above Trust Fund, subject to the same terms and conditions, the following property:-

Five thousand Dollars ($5,000.00) in par

Fund, subject to the same terms and conditions, the following property:-

Five Thousand Dollars ($5,000.00) in par value of the five (5) per cent Income Bonds of the New Orleans, Texas and Mexico Railway Company, with coupons No. 13 and subsequently attached. ———

William Evans Guy

Witness:
Wm Edwin Guy.

Jan. 1, 1923 Added to the above Trust Fund, subject to the same terms and conditions, the following property:

An undivided 1/4 interest in 500 shares Preferred Stock American Investment Securities Company, par value $10.00 per share, evidenced by Certificate No. B42, in the name of William Evans Guy, indorsed in blank.

An undivided 1/4 interest in 50 shares Preferred Stock Oliver Electric Manufacturing Company, par value $100.00 per share, evidenced by Certificates No. 5, 30, and 35, in the name of William E. Guy, indorsed in blank.

Witness:
Wm Edwin Guy.

William Evans Guy

Dec. 21st 1923 Added to the above Trust Fund, subject to the same terms and conditions, the following property:

$17,500 in par value of St. Louis-San Francisco Railway Co. Adjustment 6% Bonds, with coupons maturing April 1st 1924 and subsequently attached.

Witness:
Wm Edwin Guy

William Evans Guy

April 1st 1924 Withdrawn from above Trust Fund 50 shares pfd com Oliver El. Mfg Co. pfd stock, (undivided interest 1/4 Beneficiary) and substituted and added subject to the same terms and conditions

An undivided 1/4 interest in $50,000 par value of 5% [illegible]

Series B Mortgage Bonds of St. Louis San Francisco Railway Co with coupons maturing July 1st 1924 and subsequently attached

An undivided 1/4 interest in $50,000 par value each Steel Co. Stock as evidenced by Cert. No. A123 for 500 shares in name Wm E. Guy, indorsed in blank

William Evans Guy

Witness:

Wm Edwin Guy

Jan. 1, 1925 Added to the above Trust Fund, subject to the same terms and conditions, the following property

An undivided one fourth (1/4) interest in $10,000 in par [illegible] 15 year 7% [illegible]

Wm Edwin Guy

Jan. 1, 1925 Added to the above Trust Fund, subject to the same terms and conditions, the following property:

An undivided one fourth (1/4) interest in $40,000 in par value 15 year 7% note of Mo. Pacific Ry. Co. given for purchase of stock of New Orleans Texas + Mexico Ry Co with said stock attached as collateral and all held now by G. H. Walker & Co. in New York. said notes bearing 7% interest, payable June 1 and December 1

Witness:
Wm Edwin Guy.

Wm E. Guy

Sold Wm E. Guy

April 1st 1927, added to the above Trust Fund, subject to the same terms and conditions, the following property:

An undivided one fourth (1/4) interest in $1000 shares Missouri Pacific 5% Preferred Stock, par value $100.

An undivided one fourth (1/4) interest in 400 shares Sugar Estates of Oriente Preferred Stock, par $100

Witness:
Wm Edwin Guy.

Wm E. Guy

Dec. 20th 1927 added to the above Trust Fund & subject to the same terms & conditions:

An undivided 1/4 interest in 400 shares A.T. & T. Co. Com Stock, par value $100 each

An undivided 1/4 interest in $2000 U.S. Liberty 3 1/2 Bonds

Witness
James Kennedy

Wm E. Guy

DECLARATION OF TRUST FOR EVELIN S. GUY.

I, William Evans Guy, of the City of St. Louis, and State of Missouri, hereby declare, this third day of January, 1921, that I hold in trust for my daughter Evelyn S. Guy, the following property, to wit:

Sixty Thousand Dollars ($60,000.00) in par value of the five percent Income Bonds of the New Orleans, Texas & Mexico Railway Company, with coupons maturing April 21, 1921, and subsequently attached; also Twelve Thousand Dollars ($12,000.00) in par value of the St. Louis Union Trust Company's five percent certificates of the Annuity Realty Company;

with the powers and for the uses and purposes hereinafter set forth, as follows:

1. I am to have the power at any time, and from time to time, to sell any of the trust property or estate, for such price and prices as I may determine. Any money coming into my hands as the proceeds of any such sale or otherwise and forming a part of the principal of said trust estate shall as soon as practicable, be reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted to the purchase of such property as is ordinarily deemed advisable

In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to be added as part of the said trust estate, and I am not to be restricted to the purchase of such property as is ordinarily deemed advisable for investment property. I am likewise to have the power to rent or lease any and all real estate which may be included in said trust property for terms of any duration, whether such terms shall extend to a time beyond the termination of this trust or not. I am likewise to have full power and authority in my discretion to borrow money and secure the same so borrowed by pledge or mortgage of any and all portions of said trust estate and I may out of the corpus or income of said trust estate, or out of both such corpus and income repay the sums so borrowed. I am to have full authority to invest or reinvest any sums so borrowed; and to collect and receive the rents, income and profits arising from the trust estate therein created. It being my intention to retain as trustee such rights, power and authority in respect to the management, control and disposition of said trust estate for the use and benefit of the beneficiary, as I have with respect to property absolutely owned by me.

2. Out of the income and revenue accruing from said trust estate I shall have power to pay all taxes, expenses necessarily or properly incident to its care, preservation and management; and all other reasonable or necessary charges incident to the administration of the

Plaintiffs' Exhibit 4.

trust created hereby, and out of the remaining income and revenue, I am to pay the beneficiary of this trust an allowance of $300.00/100, a month, with power in my discretion from time to time to increase or decrease the said allowance whenever I may deem it to be to the best interest of the said beneficiary, to have such allowance increased or decreased, I shall have the power, from time to time, out of the remainder of said income and revenue, to appropriate and pay such sums as I may deem reasonably necessary for the maintenance, support and education of said beneficiary. Any income not distributed as hereinabove provided shall be added to the principal of the trust estate.

3. In case of an emergency, or illness of said beneficiary, requiring a greater sum than that accruing as income or revenue, I shall have power to use as much of the principal of said trust estate as may be absolutely necessary.

4. Any receipt given by the beneficiary of this trust to me for any sum paid to her by me, shall be a full acquittance and discharge

shall have power to use as much of the principal of said trust estate as may be absolutely necessary.

4. Any receipt given by the beneficiary of this trust to me for any sum paid to her by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

5. The foregoing provision for my said daughter, Evelyn S. Guy, shall be for her sole and separate use, free from all statutory and marital rights of her husband; and free from her debts and without the right on her part to assign, pledge, hypothecate, or anticipate, or in any way create a lien upon any of the income or corpus of the trust estate hereby created before she shall receive the same, nor shall any of the said income or corpus be subject to any claims of any persons who may or any time be creditors of my said daughter.

6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease immediately.

William Evans Guy

(witness)
Wm Fabian Guy

(OVER)

January 2nd 1902

added to the above Trust Fund, subject to the same terms and conditions, the following properties:

Two thousand five hundred dollars ($2,500.00) in par value of the New Orleans, Texas & Mexico Railway Company's five per cent Income Bonds, with coupons No. 11 and subsequently attached; also Five Hundred Dollars ($500.00) in par value of St. Louis Union Trust Company five per cent certificates of the Annuity Realty Company.

William Evans Guy

January 12th 1902 added to the above Trust [illegible] subject to the same terms and [illegible] properties

[illegible] subject to the same terms and
conditions, the following property:
[illegible] shares $ 100.00 each in par
value of the five percent (5%) Income Bonds
of the [illegible] Texas and Mexico
Railway company, with coupons No. 13
and subsequently attached.

William Evans Guy

Witness:
[illegible] Guy

January 1, 1923. Added to the above Trust Fund, subject to the same Terms and Conditions, the following property:

An undivided 1/4 interest in 500 shares Preferred Stock American Investment Securities Company par value $1.00 per share evidenced by Certificate No. B 42, in the name of William Evans Guy, indorsed in blank.

Witness: An undivided 1/4 interest in 50 shares Preferred ~~Stock~~ Oliver Electric & Manufacturing Company par value $100.00 per share, evidenced by Certificate Nos. 5, 20, 35, in the name of William E. Guy, indorsed in blank.

Sold & new issued

William Evans Guy

Witness:
Wm E Evans Guy

Sold & new issued

Dec. 21st, 1923 Added to the above ~~Trust~~ Fund, subject to the same terms and conditions, the following property: $17500 in par value of St. Louis-San Francisco Railway Co 6% Adjustment 6% Bonds, with coupons maturing April 1st, 1924 and subsequently attached

Witness:

William Evans Guy

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April 1st 1924. Withdrawn from above Trust Fund 50 shares of [illegible]
Shiver Co. - Mfg Co. (undivided interest of this beneficiary ¼) and [illegible]
and added, subject to the same terms and conditions

An undivided ¼ interest in $50,000 par value of [illegible]
Lien Series B Mortgage Bonds of St. Louis San Francisco Railway Co.
with coupons maturing July 1st 1924 and subsequently [illegible]

An undivided ¼ interest in $50000 par value [illegible]
Steel Co. stock as evidenced by Cert. No. A 123 for 500 shares
name of Wm. E. Guy, indorsed in blank.

Witness:
Wm Erwin Guy

William [illegible]

Jan. 1st 1925. Added to the above Trust Fund [illegible]
subject to the same terms and conditions [illegible]
property:

An undivided one fourth (¼) interest in $1 [illegible]
in par value 15 year 7% Note of Rio [illegible]
given for purchase of stock of [illegible]
Mexico Railway Company with said stock
attached as collateral and all [illegible]
P. N. Walker & Co in like form [illegible]
bearing 1% interest payable [illegible]

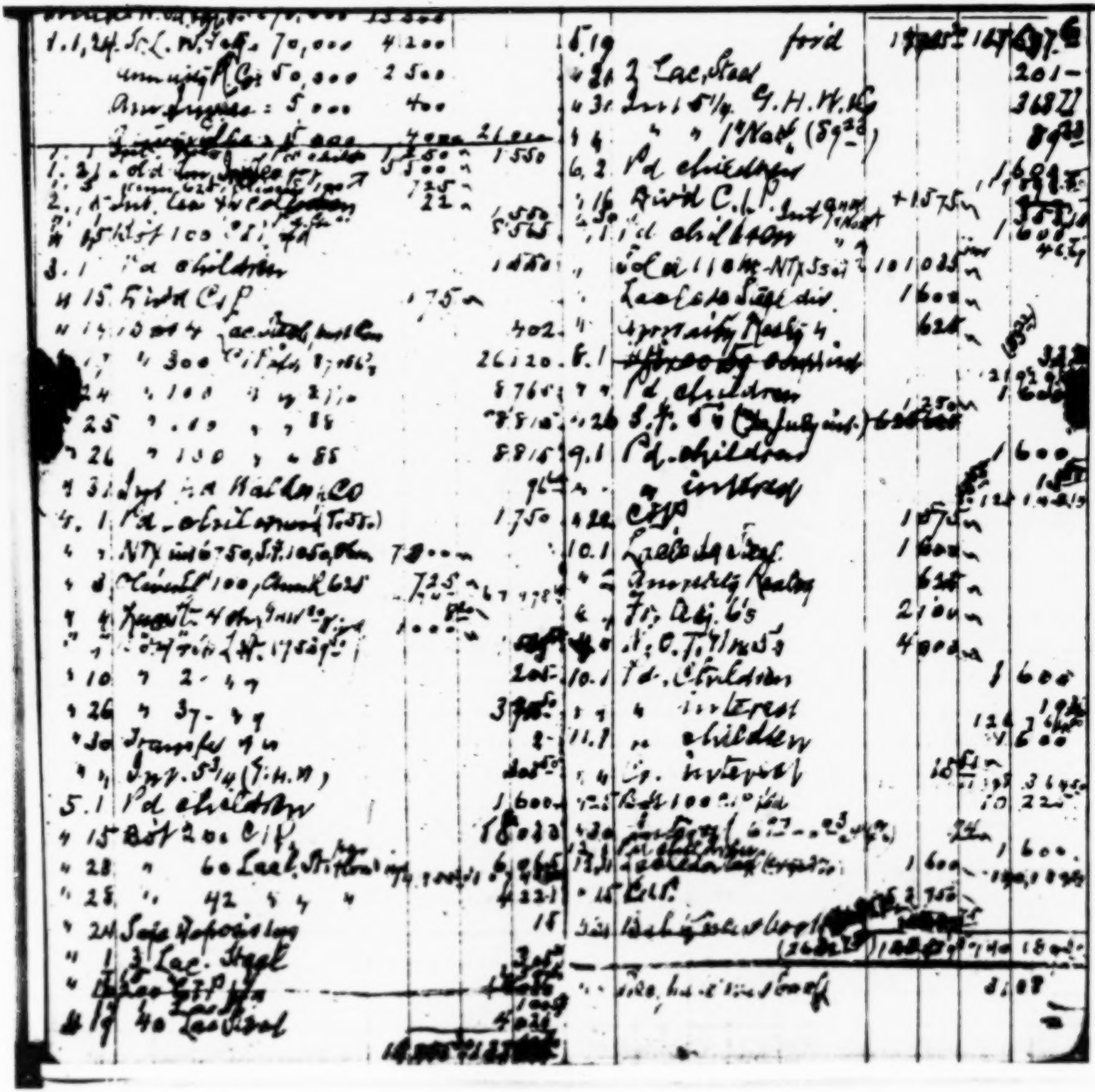
Sold & Returned

Trustee CASH ACCOUNT. with Children Trust

		Received.	Paid.
	Trust Fund N.O. 4½%	270,000	13500
1	1,24 S.L. N.T. 4½	70,000	4200
	Commercial Co	50,000	2500
	Assignments	5000	400
	Principal	5000	4000 21600
1	Int. 5% Old Loan Trustees		5500 " 1550
1	2 " Old Loan Trustees		5500 "
	Int. 6% Old Loan Trustees		325 "
2	Int. Loan Collateral		22 "
	65 shs 100 " Pd		5550
3	1 " Children		1650
14	15 Fund C.P.		375 "
"	14 300 " Lac. Steel, Int. Com		402
"	" 300 " " Int. 8 mos		26120
24	" 100 " " " 2 "		8760
25	" 100 " " " 88		8810
26	" 100 " " " 88		8815
"	31 Int. on Balance Co		96
5	1 Pd. Children Trust (T.S.)		1750
"	" N.T. int 6 mos 50, S.F. 1050, Com		7800 "
"	8 Com. 100, Com. 625		725 " 6749
"	4 Trust 4 Ch. Trust 100		400 "
"	" " " Int. 1750		
"	10 " 2 " "		200
"	26 " 37 " "		3700
"	30 Transfer " "		8
"	" Int. 5¾ (S.H.W.)		4850
5	1 Pd. Children		1600
"	15 Bal 200 " "		18000
"	28 " 60 Lac. Steel		6965
"	28 " 42 " "		4221
"	24 Safe Deposit Box		15
"	1 2 Lac. Steel		345

Trustee CASH ACCOUNT. MAY. 65

		Received.	Paid.
5	19 Pd	17345	12497
4	21 2 Lac. Steel		201
4	30 Int. 5½ G.H.W. Co		3687
4	" " 1 Nat. (89 23)		8923
6	2 Pd children		1600
"	16 Rivid C.P. Int 9 mos	1575 "	3850
"	30 1 Pd children "		1600
"	" Coll 110 M-NT 35 d	10085 "	4625
"	Lac Co Sept div.	1600 "	
"	Approximately Realty	625 "	
8	1 Interest on Bonds		3300
"	" Pd children		2250
"	26 S.F. 5% (Jan July int.)	6250 "	
9	1 Pd. children		600
"	" interest		1450
4	28 C.P.	1575 "	1425
10	1 Lac Co Sept div.	1600 "	
"	" Approximately Realty	625 "	
4	" Fr. Adj. 6's	2100 "	
4	" N.O.T. 7 M 5's	4000 "	
10	1 Pd. Children		600
"	" " interest		1250
11	1 " children		600
"	" " interest		1650 3450
"	Bal 100 " "		10 22 "
"	30 Int. 6% 23		2400
"	" Int. 6% 23		1600
"	31 Lac Co Sept div.	1600 "	1425 1025
"	15 Bal.	3750	
"	Balance Carried Down		18000
		1800	18000



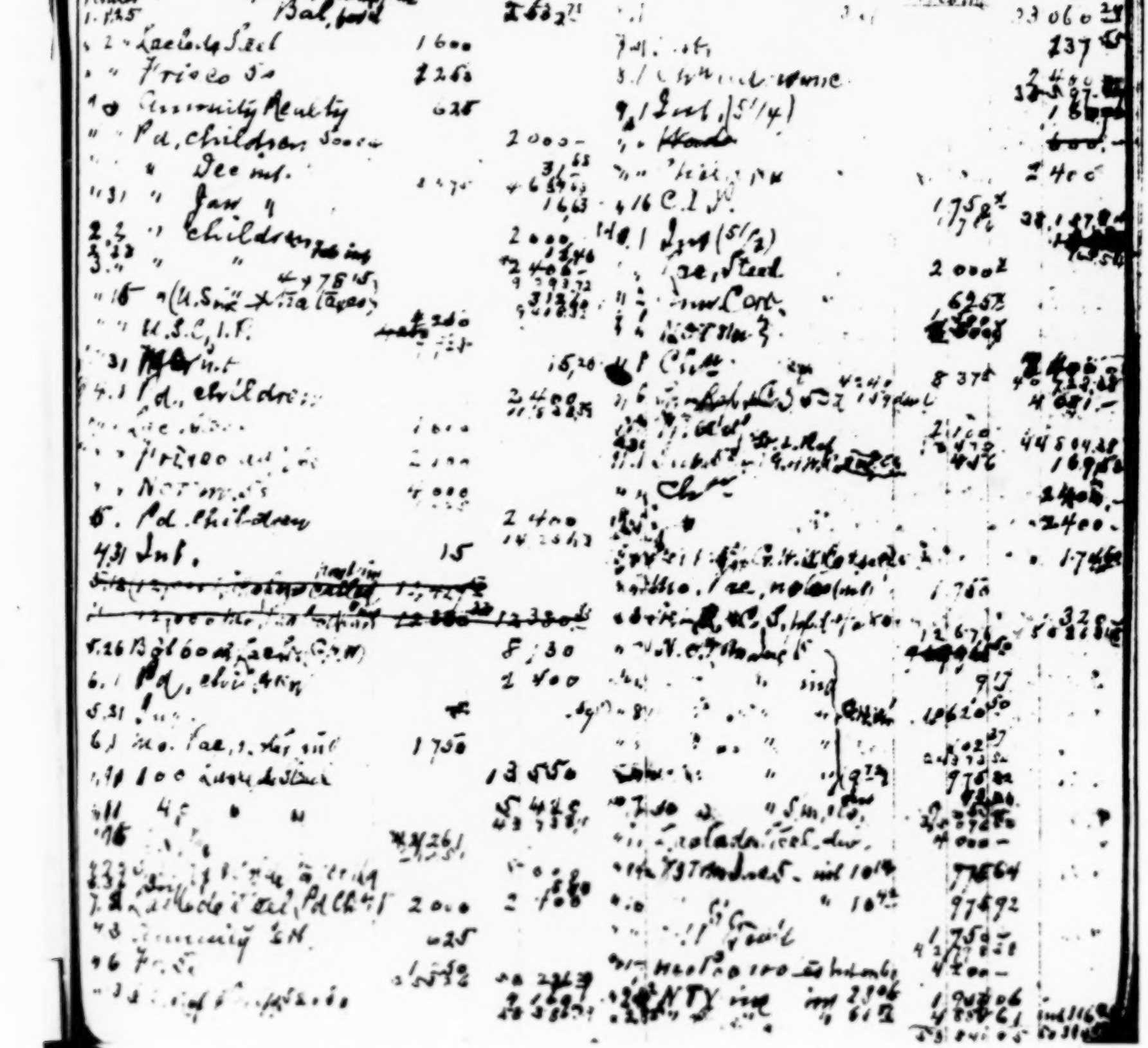
Investor ACCOUNT. Richardson Children

CASH ACCOUNT. APRIL.

		Paid.		Received.	Paid.
1.25	Added 50,000 Mater 7% Inv Corp Bal. brot	263271			23060 25
" 2	" Lacl. & Steel	1600			137 50
" "	" Frisco 5s	2263			2400
" 10	" Security Realty	625			1875
" "	Pd. Children Scott	2000-			600-
" "	" Dec int.	3163			2400
" 31	" Jan "	4654			
2.2	" Children	1663			
3.3	" "	2000			
" 16	" (U.S. Smelting)	2400			
" "	" U.S.C.I.P.	7815			
" 31	" Int	3139.72			
4.1	Pd. children	16,20			
" "	" Int.	2400			
" "	" Frisco 5s	1600			
" "	" Nat. Steel	2100			
5.	Pd. Children	4000			
4.31	Int.	2400			
		15			
6.26	Bot 60 sh Lacl. (C.W.)		830		
6.1	Pd. children		2400		
5.31	"				
6.1	Int. Pac. 1st 5%	1750			
" 11	100 Lacl. Steel		13550		
" 11	40 " "		5488		
" 16	"				
			5008		
7.2	Sold 100 Lacl. Pd Ch	2000	2500		
" 3	Security Int.	625			

CASH ACCOUNT. APRIL. 67.

		Received.	Paid.
			23060 25
			137 50
			2400
			1875
			600-
			2400



Plaintiffs' Exhibit 7.

Louise ~~cash~~ ACCOUNT. (Children)

1926		Received.	Paid.
12/31	Bal. fwd	3456 53	
1.4	NOTE	980 72	
" 4	"	1892 67	
" 2	Pd Chr		2400.
"	Lee Steel	200 --	
" 7	Pine St	1262 -	
" 9	Gen. Realty	626 -	
" 16	NOTE	3719 22	
" 19	"	3403 -	
" 19	"	1287 -	
" 20	"	3677 -	
" 20	"	3677 -	
" 25	"	3677 -	
" 26	"	2937 -	
" 26	"	1962 -	
" 27	"	1962 -	
" 28	"	1962 -	
" 28	"	1962 -	
" 28

1926		Received.	Paid.
Dec 31	Balance	345603	
"	Int.	9872	
"	"	18923	
"	Pd Chq		2400
"	Land Sales	200	
"	Rents	1262	
"	Misc. Receipts	626	
"	Int.	19571	
"	"	3463	
"	"	1288	
"	"	3703	
"	"	4508	
"	"	1077	
"	"	2265	
"	"	1075	
"	"	1707	
"	"	1707	
"	"	1707

Plaintiffs' Exhibit 8.

CASH ACCOUNT. OCTOBER.

1926		Received.	Paid.
Jan 14	/ milk wages	60	10 -
" 10	" Dr. H. Tidsall (Dr)		5
" "	" Income 1 25 (1 25)		1 25
Jan 14	/ milk	60	
" "	" "	60	
Jan 2	" "	60 -	10/4 22375

Trustee re children's Estate

CASH ACCOUNT. OCTOBER. 71

		Received.	Paid.
12	Bal for'd	4150 9	
"	100 Sol Gold R. Pfd. 120		12025 -
"	6 Lake de St. dividend	5000 -	
"	10 C. & P. "	2303	
"	21 " int 5½		7384
	" Balance	57967	
		120335	120356

Plaintiffs' Exhibit 9.

Trustee's CASH ACCOUNT. with [illegible]

CASH ACCOUNT. APRIL, 73

		Received.	Paid.
27			
8.1	Bal. [illegible]		57 9 07
"	Paid W.E.G. for loan to Kate		8 00 00 —
" 8	Pd. children		3000 —
" 1	" W.W.G. [illegible]		1 [illegible]
" 3	Rec'd on Elec	50 —	
" 10	" Coal St	2000 —	
"	" Fr. 5c	1 283	3619 07
" 5	Commissy	625 —	
" 4	So. Park Rec	200 —	
" 17	on Ice. note	1 09 [illegible]	
" 1	Colo. 6% Vol. [illegible]	[illegible]	[illegible]
" 31	Int. for W.W.G. [illegible]	37 —	17 —
2.1	Pd. children		3000 —
2.8	" int	[illegible]	[illegible]
3.1	R. & E. W.W.G. "	[illegible]	4 39
" 2	J.G. Children		3000 00
" 15	" " U.S. Liq. 8% "		35 3 96
" 16	" C.C.C.I.P. " 1902	2308 —	[illegible]
4.1	" " " 1902		[illegible]
" 1	" " Gran. W.W.G. "	37 —	
"	" Children		3000 —
" "	" Coal St	2000 —	
" 4	" on Elec	750 —	
" 5	" So. Park Rico	200 —	
" 4	" Commissy Royalty	625 —	
" 8	" Fr. Cks.	2100 —	[illegible]
" 22	" Tyrol Mg. Elec 30.00		508 75
" "	" Int. 7/8, 2nd Comm. 100		1912 50
" "	" So. Park R'y Co. Comm.	2600	29 —
" "	" Int. on 10		10 3 —
" 30	" C.C.C. Slot P. S.W.G.	37	
5.8	J.G. [illegible]	[illegible]	[illegible]

		Received	Paid.
5.1	30 children Bal. [illegible]		[illegible]
4.4	32 "		
" 17	Comp. to W. Bal. Pd. 7.96	30000	30 20 —
" 24	300 C.C.C.I.P. (-Bkm. 87)	3 44 8 —	
" 21	16 " "	3 1 84 36	
" 28	30 " "	30 78 [illegible]	
" 30	" "	[illegible]	[illegible]
" 30	" Int. on W.W.G. 3/4 int	87 00	
6.1	State Treasy. (4) U.S. Wr.	6 37 — 17	354 66
" "	" Children		[illegible]
" "	" N. Park Co.	750 —	
" 16	C.C.I.P. 130 " int	[illegible]	[illegible]
7.11	Children		3286 —
" "	" " W.W.G. int	37 —	
" "	" " "	[illegible]	[illegible]
" "	" " " int	32 —	11 87
" "	"		[illegible]
" 18	" C.S.P.C.R.	500 —	
7.1	" " (4) W.W.G.	37 —	3000 —
" 2	" N. Park Co.	[illegible]	
" 15	" U.S. Int.		23 [illegible]
" 16	" C.C.I.P.	1750	
10.1	" W.W.G.	87 —	
" "	" "	[illegible]	[illegible]
" "	" "		[illegible]
" "	" on El 750 [illegible]	1750 —	
" "	" Fr. Bk 2100 [illegible]	[illegible]	
" 20	" C.C.I.P. [illegible]	[illegible]	
" "	" Bonds	[illegible]	[illegible]
11.1	" W.W.G. int	[illegible]	32 [illegible]
" "	" So. St. Loan	666 —	
" 1	Colo. 3000, Tyrol El 1750	[illegible]	3765 72
" 15	C.S.W.	[illegible]	
12.1	Children 4000 C.C.I.P. 1750	750 —	40 [illegible]

		Received.	Paid.
	Bal. paid		
	Cash U.S.G. for loan & Wage		
	Pd. Children		
	" U.W.G. for		
	Rec'd on, Elec		
	" Local St.		
	" Fr. St.		
	Community		
	So. Porto Rico		
	on Loc. note		
	Colorado 6% Notes		
	Int. for U.W.G.		
	Pd. Children		
	"		
	N.Y.E. W.V. "		
	Jg Children		
	" U.S. Ley		
	" C.A.E.C.P.		
	" from U.W.G.		
	" Children		
	" Local St.		
	" on Elec		
	" So. Porto Rico		
	" Community Realty		
	" Fr. City		
	" Tyrol Hy Elec		
	" Int.		
	" So. Porto Rico		
	" Nov.		
	" U.S.G. for		
	" Jg. Hy.		

		Received	Paid.
	So. children Bal.		
	Cont. U.S.W.		
	" C.A.E.C.P.		
	"		
	" C.A.E.C.P.		
	Scalp-Acid		
	Children		
	N. on E.		
	C.A.E.C.P. (30 min)		
	Children		
	" U.W. on		
	"		
	"		
	"		
	" C.A.E.C.P.		
	"		
	N. on E.		
	" U.S. Loc		
	" C.A.E.C.P.		
	"		
	"		
	" on Elec		
	"		
	"		
	"		
	"		
	"		
	Cal. Col.		
	C.U.S.W.		
	C.A.E.C.P.		
	"		
	"		
	"		

CASH ACCOUNT.

		Received.	Paid.
28			
1. 1	Balance		8277
" "	Paid Chilmark		3.00
" 3	Cash 2000, Am Bl 750		
" 4	Am R 625	625	
" 2	Paid 3200	3200	3200
" 2	Sold 72 Fr. 01 72.50	72.50	1822
" "	Bot 36 Bengal 6½		34
" "	" 250 Sh.		23
" 11	" 100 N. Am Co		6
" 21	Chil. Nitrate Bills		
3. 1	Check		8
" 2	Cash 1000	8.60	
" 10	Cash P. 1-60		1850
4. 2	Check - Wade ord.	100	8
" "	Cash 2000, Am Bl 750	2750	
" 3	Am R 625	625	
" 15	Bengals	625	
" 28	Paid Sundries		8
" "	" 666,	666	6
5. 1	Cash 3000, Check	3000	3
" 7	Dyn. H.E. 1900	15	15
" 9	Cash N.W. 050		
8. 2	A 1000, N.A.E. Pacific	1900	92
" "	Cash Sundries		77
6. 1	Dyn. H.E. 1900	1900	15
7. "	Cash 2000, Am Bl	2750	
" "	Am R. 625; N.W.S. 100	725	
" 1	Check		8

		Received.	Paid.

There are no references to my father as trustee for his children in that book. The other three books are as follows: One is a black pocket notebook, similar to the rest, carried by my father, for the calendar years 1921 and 1922. One is a note and account book for the years 1923 and 1924, and the next is a similar note and account book for the calendar years 1925 and 1926.

My brother and sisters knew of the creation of these trusts shortly after their execution, I should say, in the year 1921, and were furnished with copies of the trust instruments during that year. The witness identified plaintiffs' exhibits 5 to 10, inclusive, as follows:

64 Plaintiffs' exhibit 5, as a photostatic copy of a page in his father's pocket memorandum book for the years 1923 and 1924;

Plaintiffs' exhibit 6, as a photostatic copy of a page from his father's account books for the year 1925;

Plaintiffs' exhibit 7, as a photostatic copy of a page from one of the black memorandum books carried by his father for the year 1926;

Plaintiffs' exhibit 8, as a photostatic copy of another page from the book for 1926;

Plaintiffs' exhibit 9, as a photostatic copy of page from the book for 1927;

Plaintiffs' exhibit 10, as a page from the notebook for the year 1928.

Plaintiffs' exhibits 5 to 10, inclusive, were thereupon offered in evidence and received without objection and are as follows:

77 By leave of court Mr. Guy was at this point withdrawn from the witness-stand while Dr. Fischel, Mr. Jones, and Mr. McPheeters testified.

At the conclusion of their testimony Mr. Guy further testified.

Direct examination:

I have examined these accounts and was at one time familiar with them item by item, and am now familiar with them generally. These entries are the accounts of my father as trustee for these four trust funds, each one of which was identical, that is, the funds in each trust fund were identical, and these accounts consist of entries of income received from the trust funds, and purchases and sales of trust funds securities, and the payment of income to the beneficiaries. These entries are entirely in my father's handwriting.

The itemized entries start with January 1, 1924. Prior to 1924 there were general entries of the securities held and the amount paid out. The reason for not keeping an itemized account of the trust accounts prior to the year 1924 was that the trust funds were started in 1921 and up until the year 1924 there were no changes except additions to the trust funds, no purchases and sales of securities, and the entire income from each of the trust funds was paid out to the beneficiaries in each of these three years. The income for the first year amounted to $14,400.00, $3,600.00 to each beneficiary.

The second year it amounted to $15,000.00 $3,750.00 to each beneficiary, and the third year $4,200.00 to each beneficiary. In the year 1924 the entire income of the four trusts was approximately $32,000.00, of which $20,500.00 was distributed to the beneficiaries. In the year 1925 the actual income for the four trusts was about $49,000.00, and the actual distributions to the beneficiaries were $26,900.00. At the end of 1924 there was an undistributed balance of income of $11,300.00. At the close of the year 1925 there was an undistributed balance of income of $32,000.00. During the year 1926 there was distributed to the beneficiaries as income $32,500.00, and the accumulated balance of undistributed income at the end of the year 1926 was $46,900.00. During 1927 $37,300.00 was distributed to the beneficiaries as income, and at the end of 1927 the accumulated balance of undistributed income was $54,000.00. For the first six months of 1928, until the termination of the trusts on July 24, 1928, the distribution to the beneficiaries was $23,627.00. At
78 the termination of the trusts the accumulated income balance for the entire trust period was $58,144.00. I had these account books of my father's audited and the figures I have given are the results of that audit. These figures agree with the books kept by my father except for certain errors which he made in addition in the course of seven years. These errors amounted to $6,386.49 over the seven years. There is a total discrepancy between the figures shown by my father's books and the audit finally made by the accountants of that amount. The accumulated income, as shown by the books, was used to purchase investments, and the books show the use to which the accumulated income was put, and further show that the entire amount of the accumulated income, with the exception of the discrepancy of $6,000.00 due to errors, over the eight-year period account for all the income realized from the trust funds, and further show that no part of the income was used for any purpose except the distributions and expenses of the trusts and the accumulation of income which was invested in securities. The notation on the top of each of these exhibits (5 to 10 inclusive) reading "Trustee Account with Children" is in my father's handwriting. These exhibits 5 to 10, inclusive, contain all the entries in the memorandum book with respect to my father's accounts, as trustee, and from the year they were first started until July 1928 these books, when analyzed, show all the transactions and all the income and distributions made for the trust funds during the existence of the trusts.

The COURT. The ages of those parties are admitted by the answer!

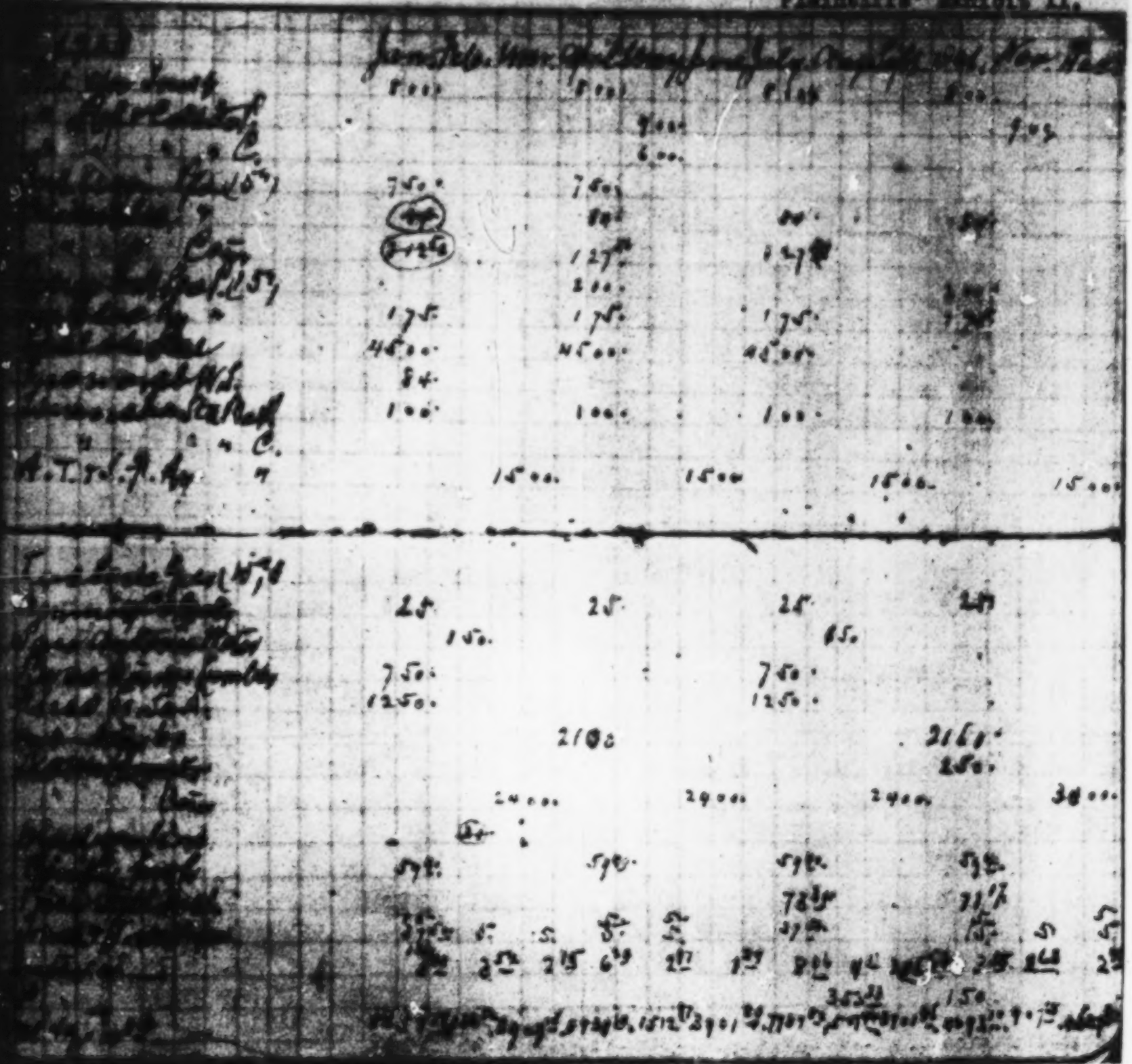
Mr. DYER. I do not believe it is.

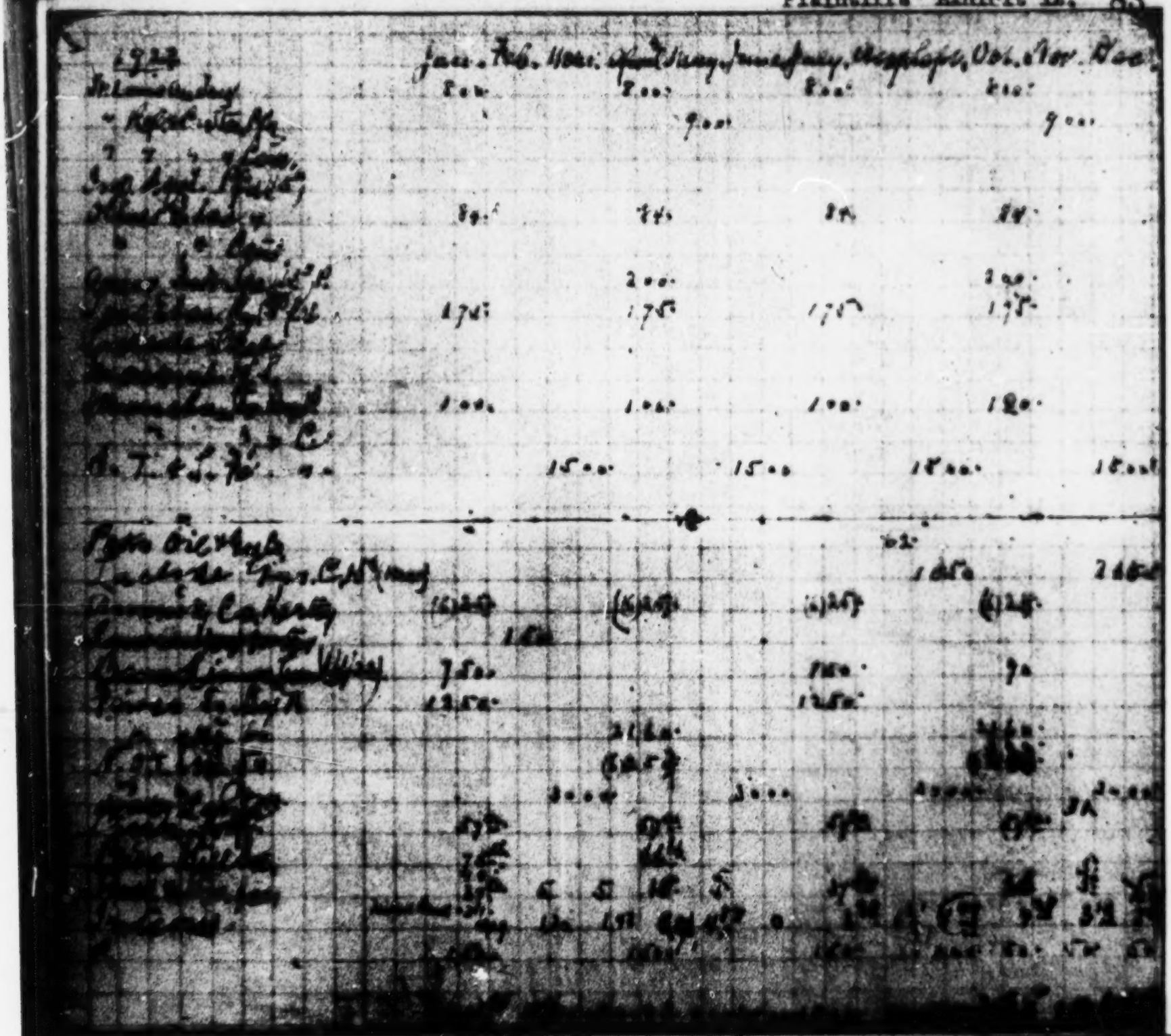
The COURT. They were all admitted by the answers?

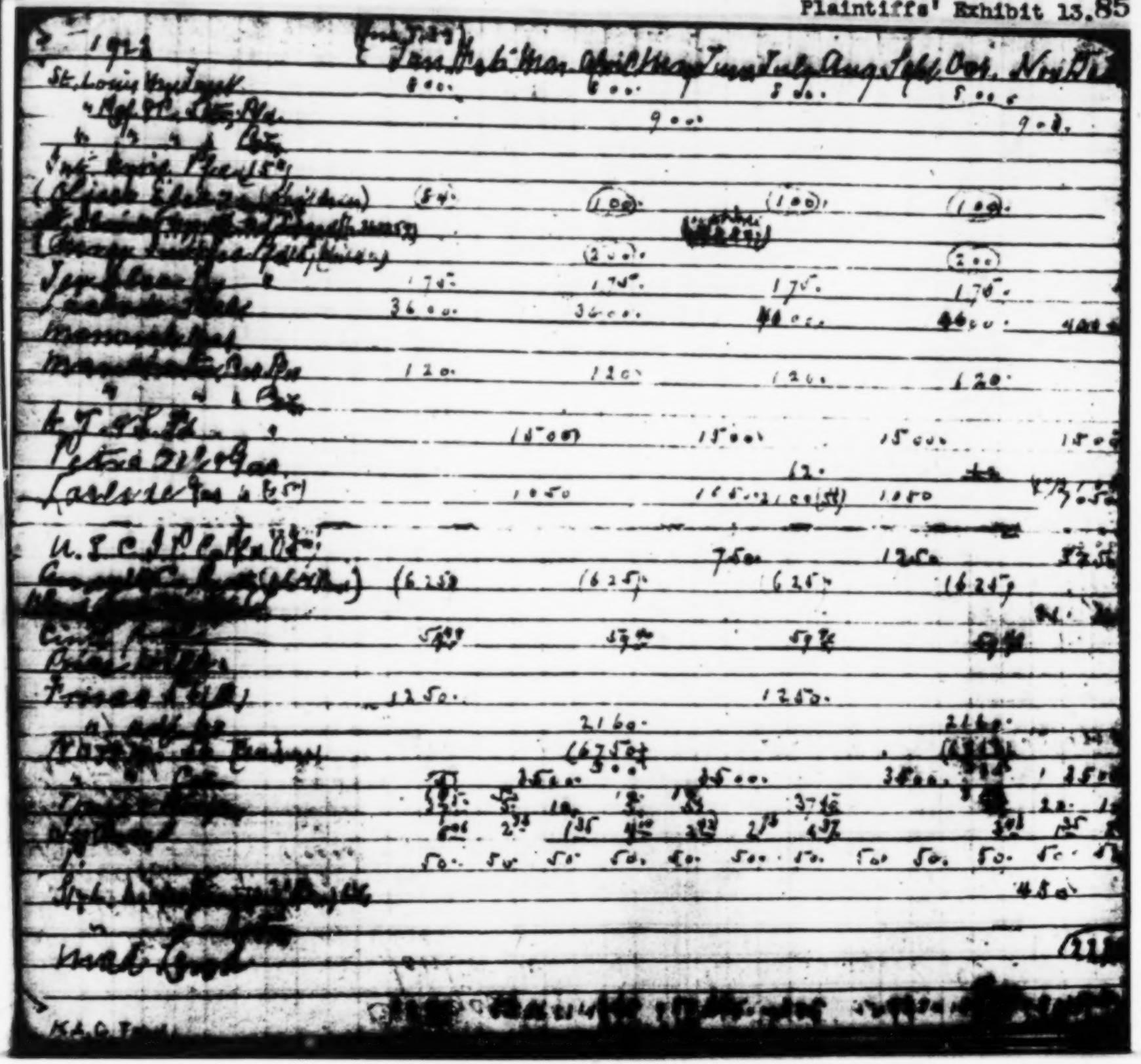
Mr. JOHNSON. No; Your Honor, it isn't. The ages of Mr. Guy's children are not admitted.

Mr. DYER. I can admit those ages into the record and save time.

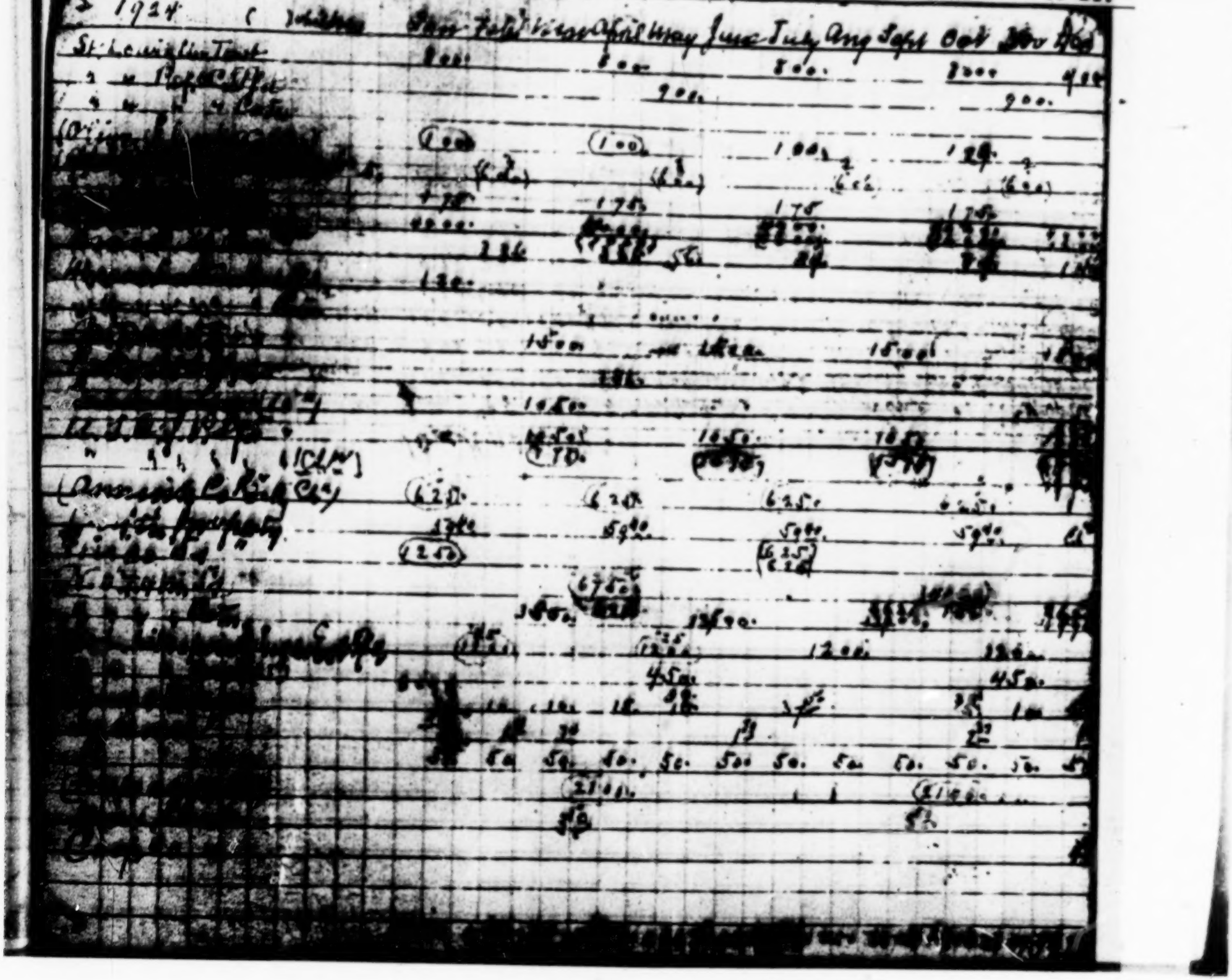
The COURT. You can admit they are correct in the petition, if you wish.

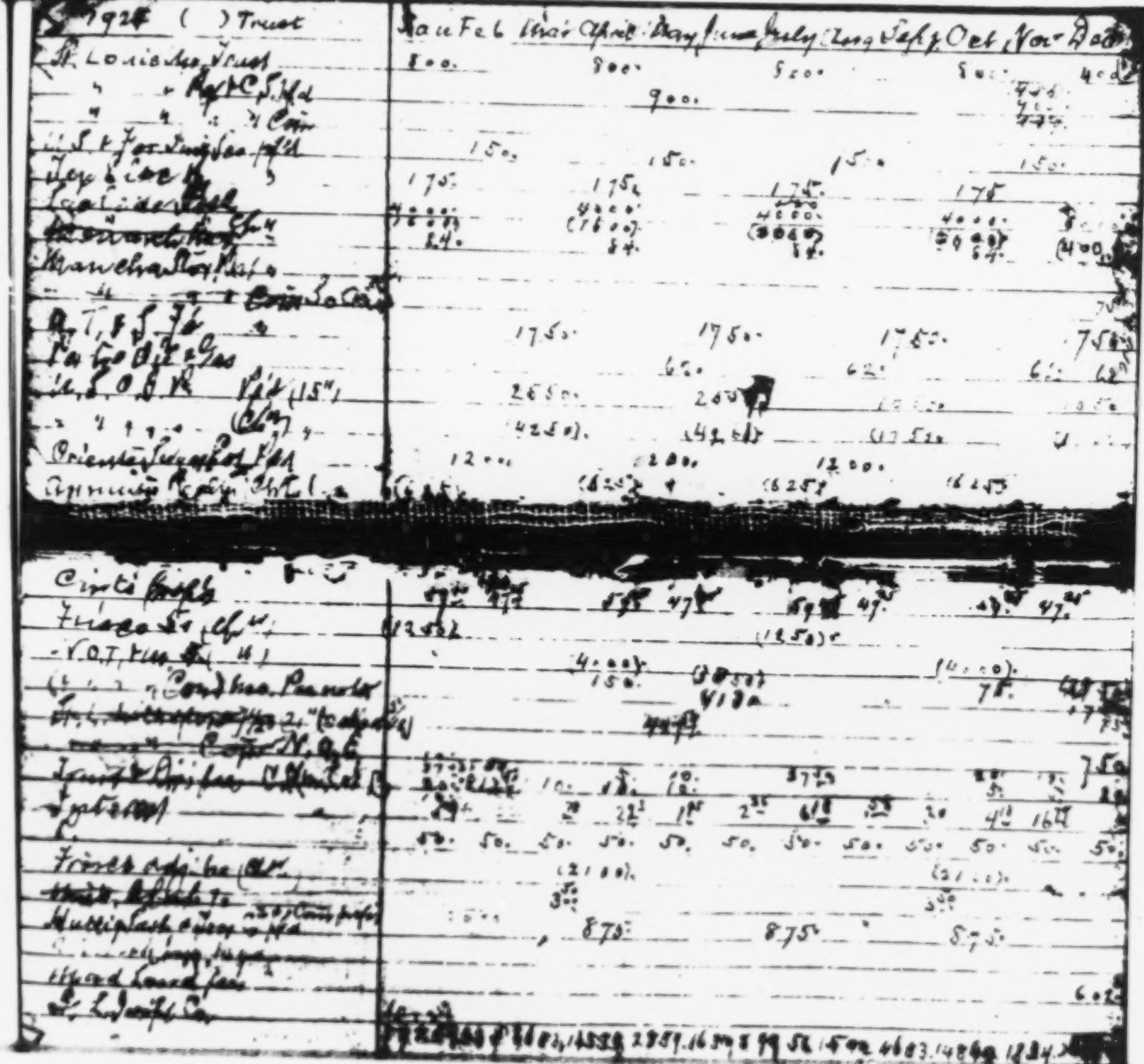






Plaintiffs' Exhibit 14.

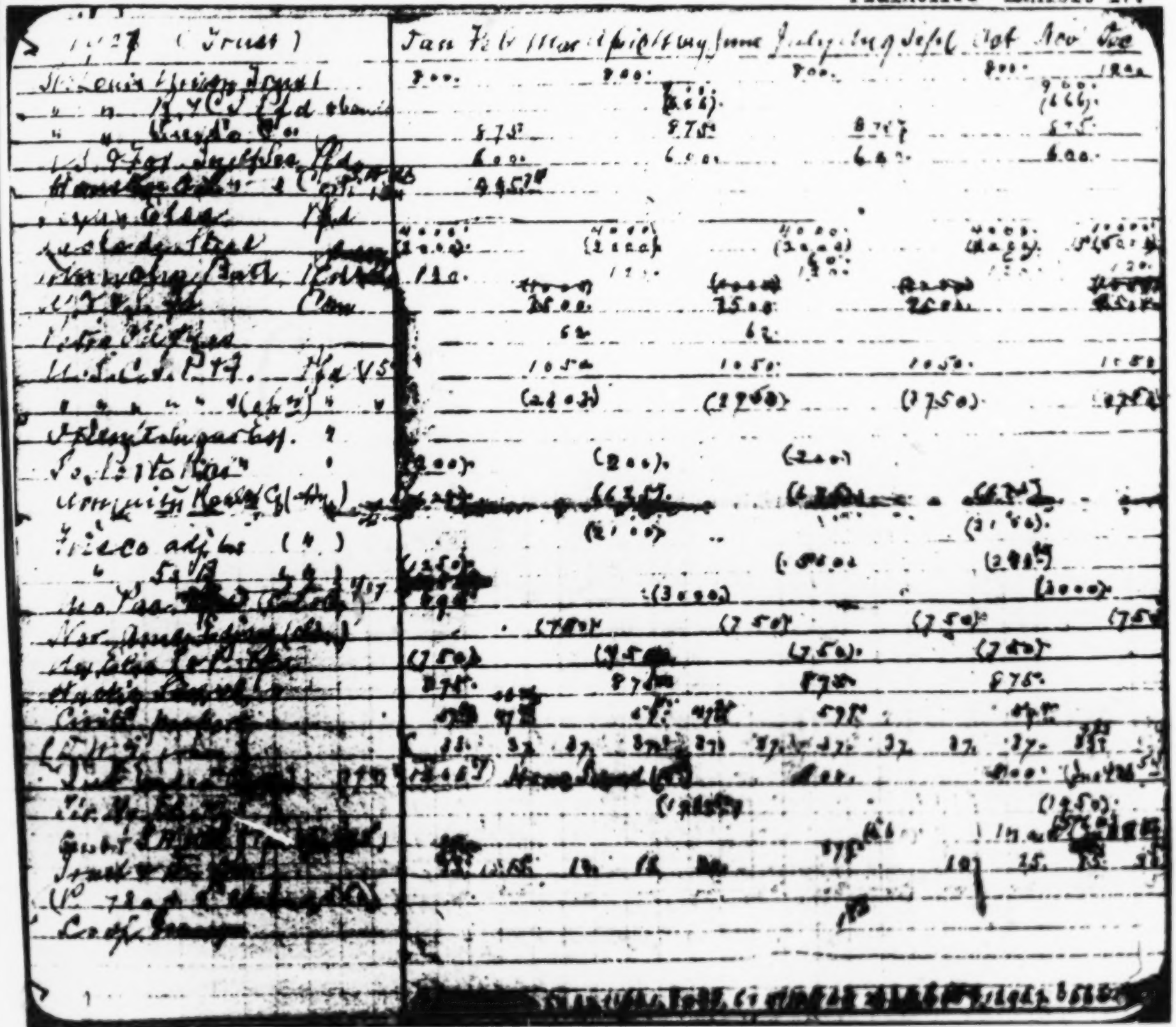




1924 ( ) Trust	Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec
1925 ( ) Trust	Jan Feb Mar Apr May June July Aug Sept Oct Nov Dec
St Louis Gen Trust	800. 800. 800. 800.
" " Ref. Fd	
" " Gen.	875. 875. 875. 875.
U.S.F. & Pacific Fd	300. 600. 600. 600.
" " " " Coupons	
Gen Elec Fd	1787 1745 1775 1775
Equitable Trust	4000. (2000) (2000) (2000) 18000.
Mercantile Nat	
A. T. & T. Fd	1750. 1750. 1750. 1750.
Penn R.R. Gen 5%	62. 62. 62. 62.
" " " 4½%	1050. 1050. 1050. 1050.
" " Pfd.	(1500) (2100) (2100) (2100)
Pittsburgh Steel	
Cambria Iron & Steel Co	16.25 625 625 625
Trinity adj. "	(2100)
Cristobal	594 475 594 475 594 475 594 475
Penna R.R. Co Cons	250. 750. 1250.
" " " Equip	1850.
Miss. Pac. 5% notes	(3950) (3950)
" " " Pfd	3500. 3500.
New Jersey Edison Pfd	(750) (750) (750) (750)
Westinghouse Elec & Mfg	875. 875. 875. 875.
Wm. Penn Oil Co	437½ Undecided 437½
Penn Electric Ry Co	(750) (750)
Utica Gas & Elec Co	37½ 10. 10. 10. 10. 25
Int. Mer. Marine Pfd	35 70 131 137
" " Com	50. 50. 50. 50. 50. 50. 50. 50. 63. 65. 65. 65.
Pennsylvania R.R. Co	(300) 375 375

1920	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct	Nov	Dec
St Louis Mer. Trust	800.		800.			800.			800.			
" " Ref. Fd.												
" " Car. Co.	875.		875.			875.			875.			
U.S.L. & Pacific Rd.	300.		600.			600.			600.			
" " " Com.												
Leg. Cole Rfd.	1787		1745			1775			1775			
Equitable Trust	40000		40000			40000			40000			
	(20000)		(20000)			(20000)			(20000)			
Am. Ex. Nat.												
L. I. R. R. Rfd.			1750.			1750.			1750.			
Nat. Bis. & Gen. 15"			62.			62.			62.			
(Dec. & Bal. 25")			1050.			1050.			1050.			
" " Pfd.			(1050)			(1050)			(1050)			
Pittsburgh Reg. & Ohio Central Pfd.												
Central Leather Co. (Com.)	1625.		625			(625)			(625)			
" Pfd.			(2100)						(2100)			
Crucible Steel	5945	4725	5945	4725		5945	4725		5945	4725		
Texas & Pac. Coal	250.					11250						
" " Pfd.	1850		750									
Miss. Pac. 5% notes						(3850)						(3850)
" " "						3500.						3500.
New Jersey Zinc Co.			(750)			(750)			(750)			(750)
Hocking Valley Pfd.	875		875.			875.			875.			
Wm. Rogers Mfg. Co.	437.50								Woodward & Co			438
Chic. Elec. Ry. Co.			(750)			(750)			(750)			
Utica Steam & Mohawk Valley Co.												
Inter. Agr. Pfd.	10.	12	5	10.		5			25	25		25
" Com.	35	40	45	50	70	85	31	12	37			37
	50.	50.	50.	50.	50.	50.	50.	50.	65.	65.	65.	65
Int. Paper Co. Pfd.	(750)		75.			75.						

Plaintiffs' Exhibit 17.



1926 (Special)	Jan	Feb	Mar	April	May	June	July	Aug	Sept	Oct.	Nov.	Dec.
St. Jos. Union Agency	800.	800.	800					800				1200
" N.Y.C.R.R. Co.												
" Lake Co.	875.	875.	875					875				
U.S. [illegible]	600.	600.	600					600				
[illegible]												
[illegible]												
[illegible]							

Mr. DYER. Yes; Your Honor, the Government will make that admission.

The witness then identified plaintiffs' exhibits 11 to 18, inclusive, as follows:

79 Plaintiffs' exhibit 11 as a photostatic copy of a page in his father's handwriting from his account book for the year 1921.

Plaintiff's exhibit 12 as a photostatic copy of a page from his father's book for the year 1922 and is in his father's handwriting.

Plaintiffs' exhibit 13 as a photostatic copy of a page from his father's notebook for the year 1923 in his father's handwriting.

Plaintiffs' exhibit 14 as a photostatic copy of a page from his father's notebook for the year 1924 in his father's handwriting.

Plaintiffs' exhibit 15 as a photostatic copy of a page from his father's notebook for the year 1925, in his father's handwriting.

Plaintiffs' exhibit 16 as a photostatic copy of a page from his father's notebook for the year 1926, in his father's handwriting.

Plaintiffs' exhibit 17 as a photostatic copy of a page from his father's notebook for 1927 in his father's handwriting.

Plaintiffs' exhibit 18 as a photostatic copy of a page from his father's notebook for 1928 in his own handwriting.

Said exhibits 11 to 18, inclusive, were offered and received in evidence without objection, and are as follows:

97 These pages are for the years of 1921 and 1928, inclusive, and are forecasts of income which my father expected to receive in each year, either for himself or as trustee. It was his habit to prepare these forecasts the last part of the month preceding the beginning of each year, that is, in the beginning of December 1920, he would prepare a forecast of what he expected to receive during 1921, and during that year, if any changes occurred, he would make an entry to show that change on this page. My father always carried the current memorandum book with him. The others, I believe, he kept locked in his desk in his office downtown. He always had the current book with him on his person.

Q. On plaintiffs' exhibit 11 I call your attention to certain entries, particularly entry appearing after the words "Oliver Electric 7s" and "Oliver Electric convertibles", I suppose?

A. It is "Oliver Electric preferred", I believe, the first. That is a ditto mark, and the next is "Oliver Electric common."

Q. I call your attention to circles drawn around those items, and ask you if you can explain any reason for that, for drawing circles around those items.

A. I can't explain that except on the theory that he had just purchased that stock and the dividend would not be due until April. In other words, the January dividend would go to the former holders of record of that stock.

Q. I call your attention to the listing "N. O. T. & M."

A. "Income", "Inc."

Q. "Income 5s", and to the fact that no entry of estimate of income appears following that listing, and ask you if you can explain that?

A. The reason for that was he evidently made up this sheet for the year 1921 sometime during the last part of 1920, and at that time he owned New Orleans, Texas & Mexico income 5s bonds, and then he decided to create these four trusts, and in the creation of the four trusts on January 3, 1921, he donated to each trust $60,000 in par value of New Orleans, Texas & Mexico income 5s, and consequently he drew a line through the notation on his income sheet for 1921 and made no entry of expected income for himself during that year.

Q. I call your attention to a listing on this plaintiffs' exhibit 11, appearing about the middle of the page "Annuity."

A. Company, that is, Realty—r-e-a-l-t-y.

Q. Annuity Realty Company, or Annuity Company, Realty, after which there is an estimate of $25 quarterly.

98 A. That entry refers to certificates of the Annuity Realty Company, and prior to the year 1920 he owned quite an amount of those Annuity Realty Company certificates, he owned $50,000 in par value of Annuity Realty Company certificates. Evidently prior to January 3, 1921, and in making this forecast of income to be expected that year he first wrote down on page for 1921 estimate of $625 for that year, and then he decided to create these four trusts, and on the 3d of January, when he wrote out these declaration of trust, he gave to each beneficiary $12,000 of these Annuity Realty certificates, retaining only $2,000 par value for himself, and as a consequence he scratched out, on income accruing to himself, the figure "6" in each quarter, leaving only $25 due in each quarter to him. You can see the erasure in the page.

Q. In the forecast for the year 1922, I call your attention to certain matters appearing in parentheses. Will you tell what these indicate, generally, not specifically?

A. Yes, where they appear in parentheses that indicates income accruing to the trust funds.

Q. For the year 1924, at the top, I call your attention to the heading or column in which appear "( ) children", and ask if you can explain what that is.

A. In this account, the word "children", income expected that year, and parentheses indicate that the income was accruing to the trust funds. The various funds were enclosed in parentheses. That was the custom followed by him for the remainder of the trusts. The securities, the incomes from which are enclosed in parentheses, correspond with the securities held in the trust estates at that time.

In connection with returning the income from these trusts for tax purposes, my father made returns as trustee for the Federal Government, and for the State of Missouri, one for each trust. I assisted him in the preparation of these returns. For the years in which all the income was not distributed my father would make the two required returns, one showing the amount distributed and

one showing the amount undistributed, and would pay a tax on the income. I know of my own knowledge that these returns were prepared and filed. The other beneficiaries were always notified of the amount shown in their return. At the end of the year they would be sent a list showing what they had received from the trust fund for that year and what had been retained by the trustee, so that they could make up their own individual returns showing the amount received as income. I know of my own knowledge that during the entire period the entire income was returned for income-tax purposes, either as accumulated or as distributed income. The Govern-
99 ment undertook to assess income taxes against my father personally on account of the income from these trust funds.

My father's activities for several years prior to 1921 until his death were as follows: He had retired from his own enterprises, that is, from any executive direction of companies long prior to 1921. In 1903 he retired from business but he had helped to organize the steel company of which he was a director during all the period from its organization up until his death. He was a director of the St. Louis Refrigerating & Cold Storage Company. He was a trustee in several syndicates and an active director in all of those, and to do all of these things he maintained an office and secretary in the Merchants-Laclede Building and other buildings. He was in St. Louis from the middle of September or October until June of each year, and every good business day he would be downtown. He would be downtown in the forenoon, go to lunch at the Noonday Club or some other place and generally returned home in the afternoon. The syndicates of which I have spoken involved large sums. Outside of my father's actual business activities he was very much interested in charitable enterprises of all sorts, educational and charitable; he followed them; I don't believe he was connected with the administration of any of them. He was trustee of the Second Presbyterian Church here and held that office at the time of his death. From the time he returned to St. Louis in about 1908 until the time of his death there was practically no change in the nature of his activities. He was trustee of the Second Presbyterian Church all of that time, and when the Laclede Steel Company was organized in 1911 he became a director and remained a director of that company until his death. He was trustee of the Little Kanawha Syndicate and two big land syndicates around St. Louis from the time of their inception until the time of his death.

My father had large personal means besides the value of the property which he transferred to these trusts. I am executor of his estate and, as I recall, the valuation at the date of his death of his own individual estate was a gross of about $1,000,000.00, and he realized a very large income from that.

Q. I believe you stated you assisted your father in the preparation of these trust instruments?

A. I did.

Q. Did your father discuss with you his motives in creating these trusts?

A. He did.

Mr. Dyer. If the court please, as I understood it, this witness was also acting in the capacity as attorney for his father at
100 that time, and I submit the instrument speaks for itself and cannot be explained or altered by statements made by the deceased in that matter.

The Court. Overrule your objection.

To which ruling of the court the defendant by his counsel then and there duly excepted.

A. Yes, I had several talks with my father prior to the preparation of these trusts. He had four children, the youngest of whom was over twenty-one—just over twenty-one at that time. My sister was married and had one child at that time. My brother was a student at the Massachusetts Institute of Technology, and I was a practicing lawyer here in St. Louis, and he said he wanted to get rid of the nuisance of treating us as children, making us an allowance. He wanted to make us independent, so we would know what we were going to get each year, and also he wanted to—as he had a large ample income of his own, and his own expenses were nowhere near his own income—avoid the high surtax, and he felt it was only justifiable to distribute the income in that way, that is, making each of his children the owner of an independent income and to pay a tax on that.

Q. Did your father ever discuss, or did you ever hear him mention, longevity as a characteristic of your family?

A. He told me frequently that his grandfather had died at the age of ninety-three as the result of an accident—I mean his father had died at the age of ninety-three as the result of an accident, and grandfather ninety-one, and great grandfather, in the male line, at ninety-nine.

Q. Did he ever mention his expectation of life?

A. Yes, he fully expected to equal that average, an average of ninety-four; he fully expected to live into the nineties. He lived a very regular life, very regular habits, was very methodical as to diets and everything else.

Q. Did he ever complain to you or did you ever hear him complain of any serious illness during the last ten or twelve years of his life?

A. No; never.

Mr. Johnson. You may enquire.

Mr. Dyer. No cross-examination.

Walter Fischel, of lawful age, being duly sworn, testified on behalf of plaintiffs, as follows:

Direction examination:

My name is Walter Fischel. I am a practicing physician and received my medical education at Washington University

101 Medical School at St. Louis. I have been practicing medicine since 1905. I specialize in a particular branch of medicine called "internal medicine." I am a member of the St. Louis Medical Society, and the St. Louis Society of Internal Medicine and a number of small societies. I first treated Mr. William Evans Guy in 1917, and he continued to consult me as a physician until June of 1928. The frequency with which he consulted me was a variable thing. There might be times, intervals of a year he might not see me, and I might see him when he had a cold, or something like that, every day for a few days. On the average, I would say about once in six months. Mr. Guy was seventy-two years old when I was first consulted; I found him then in what I thought a remarkably good condition for his age, and during the years that I followed him his general condition, generally, was, I thought, remarkably good. He was never confined to bed with any serious illness during that period except with colds, which, like anyone else has, and which I have now, or with a complaint for which I was consulted originally and which he had been bothered with for a great many years, neuralgia, a pain over his eye. He had had that for fifty years, I think, probably longer.

Q. Did you ever advise Mr. Guy that he was suffering from any sort of impairment of his health, which might result in his death?

A. I had not.

Q. Did you ever discover any such conditions in Mr. Guy's health?

A. Well, no more than, as I said, he was seventy-two years old when I first saw him; he was eighty-three years old when I last saw him, and there was nothing at any time that made me think there was any immediate likelihood of a fatal illness. To say a man of seventy-two didn't show any signs of wear and tear would be, always, a misnomer.

Q. Of what disposition was Mr. Guy; was he of an optomistic and cheerful frame of mind?

A. Well, that varied; about himself, I think he was.

Q. By that you mean he was cheerful and optimistic?

A. About his duration of life and expectancy of life, he was very proud of the fact he expected to live to be one hundred.

Q. Did he ever discuss that matter with you?

A. Yes.

Q. What did he say about the matter?

A. It came up in the course of conversations. I naturally enquired about his antecedents, and he took great pleasure in telling me that his father and grandfather and great grandfather had all lived into the nineties and he expected to do better. He was, as I say, very proud of that.

102 Q. I believe you stated that you examined Mr. Guy in June of 1928.

A. Yes; he came to see me, I think, the day before he departed for the East, which was his usual custom.

Mr. JOHNSON. It is, I think, admitted in this case that Mr. Guy died on July 24, 1928.

Q. I will ask you what Mr. Guy's condition was, both mentally and physically when he called upon you in June 1928.

A. Mentally, it was as clear as any man could be. Physically, I made a note on my record which I looked at the other day, saying he felt very well, and my examination showed a blood pressure which was normal; heart which was perfectly regular; lungs showed no signs of disease. There was nothing about his condition which caused me to give him any different directions than I had at that time.

Mr. JOHNSON. I believe it will be shown by depositions here that the cause of Mr. Guy's death was general circulatory failure. I would like permission to state that to Dr. Fischel, and as a matter of fact you understand that, do you not, Dr. Fischel?

Q. I will ask you if in this examination in June 1928 there was anything to indicate an immediate attack of circulatory failure?

A. There was none.

Q. And, of course, you did not advise Mr. Guy that he might expect such a condition?

A. I did not.

Q. I will ask you to state your opinion of Mr. Guy's mental powers and intellect during the period in which he consulted you as a physician.

A. I thought they were very excellent.

Q. And vigorous?

A. And vigorous.

Q. Are you familiar with an organization known as the Life Extension Institute?

A. Yes.

Q. Will you tell the Court what it is, please?

A. Well, it is an organization that, I think, was originally started by a group of wealthy men in New York City, who had their health somewhat on their minds, and influenced by some articles which had been written in lay magazines, they thought it would be a great thing if people generally would have periodical thorough examinations made by a group of physicians to determine if there was any serious impairment of health which might be corrected. That organization is still in existence; they are supported by a number of people who pay a fairly large amount yearly, which entitles them to one thorough physical medical examination a year and by, I think, quarterly examination of the urine.

103 Q. I will ask you what sort of reputation that organization has among physicians throughout the country?

A. As far as the examinations go, they are accepted as being very reliable.

Q. Do you know whether or not Mr. Guy ever made use of the facilities of that organization.

A. Yes; I know that he did.

Q. Were you ever furnished reports from that organization, concerning Mr. Guy?

A. Yes.

Q. What was the nature of those reports, that is, as to Mr. Guy's condition?

A. I found I had only one complete report from them, which went into his whole history just as I have gone, went over his previous illnesses, such as he had, which hadn't been many, and gave a complete examination of the body, of the blood, of the urine, reported on his blood pressure, on his eyes, teeth, and nearly everything, and their reports generally [—] that they found his condition satisfactory. At one time, I believe, he had put on five or ten pounds of weight and they advised him not to put on any more. That I remember as one of their recommendations, showing they are rather trivial in their nature. I found on my report a report of their urinalysis which stated it didn't show anything to cause alarm. You may say any man's urine at that stage of life is pretty apt to show traces of albumen and occasional casts, which that did. We don't pay a great deal of attention to that.

Cross-examination:

As I stated, when I first saw Mr. Guy in 1917 he was seventy-two years old. I never had occasion to discuss, in my contacts with Mr. Guy, whether or not he was a religious man. His mentality in 1922 was such that he would be able to comprehend and understand his own expectancy of life at that time.

Q. From your contacts and conversations with him, are you able to state whether or not you have an opinion as to whether or not he did at that time fully comprehend his expectancy of life?

A. Yes. I think he expected a long life.

Q. Do you think he understood the ordinary expectancy which a man of seventy-two years of age had at that particular time?

A. Yes; but I don't think he thought of himself as an ordinary man.

104 Q. Now, are you familiar with the American Tables of Mortality?

A. More or less; yes.

Q. Will you give us your best recollection of the expectancy of a man seventy-two years old?

A. I don't know as I could do it from memory. I don't pay a great deal of attention to it.

Q. You do not remember offhand?

A. No.

Q. When did he first become interested, if you recall, in this Life Extension organization?

A. The first time I found any notes on my records that he spoke of having been there was, I think, in 1925 or 1926.

Q. In 1925 or 1926?

A. My note then was report from Life Extension Institute, says condition unchanged, so he must have been there before that.

Q. Will you state whether or not he consulted you in the year 1921?

A. I do not remember; I do not think I found any note of that on my record, though.

Q. Will you state whether or not he consulted you in the latter part of the year 1920, perhaps in the month of December, the latter part of December 1920?

A. I don't think he did.

Q. Do you recall whether or not he consulted you at all in the month of December 1920?

A. No.

Q. Or the month of November 1930?

A. I do not.

Q. Do you state that you do not recall or that he did not consult you? I don't quite get you.

A. I do not think he consulted with me.

Q. Do you have your records here, which would show?

A. I have not them with me. As I remember, I looked them over this morning, they are bulky, and there is a gap there. In 1922 there is a record. I saw him in 1917 and 1918, and there was a gap.

Q. 1917, 1918, and 1919, and perhaps up to 1922?

Mr. JOHNSON. Q. You say there was a gap?

A. There was a gap.

Mr. DYER. That is all.

ROBERT MCKITTRICK JONES, a witness of lawful age, being duly sworn and examind, testified for plaintiffs as follows:

105 Direct examination by Mr. JOHNSON:

My name is Robert McKittrick Jones, I live in Westmoreland Place, St. Louis. I have lived in St. Louis since 1872. I knew Mr. William E. Guy during his lifetime very well.

Q. Did Mr. Guy ever discuss with you how long he expected to live?

A. Yes; I used to talk to him about his age because he and I were of contemporary age to a great extent.

Q. What did Mr. Guy say in these discussions?

A. Well, he expected to live to be over ninety. His father, I think, and grandfather lived to a great age. I think both of them lived to over ninety.

Q. Did he ever state to you specifically that he expected to live until he was older than that?

A. Yes, he expected to live to an old age.

Q. On one occasion or frequently?

A. I don't remember whether it was frequently or not, but I know I had several talks with him.

Q. How long did you know Mr. Guy, Mr. Jones?

A. Over fifty years.

Q. Did you notice his health over that period, or more particularly during the last twelve or fifteen years of his life?

A. Yes; he was always vigorous and well. I used to meet him frequently downtown and we invariably sat at the same lunch table at the Noonday Club.

Mr. JOHNSON. You may inquire.

Mr. DYER. No questions.

Mr. ALBERT T. PERKINS, a witness of lawful age, being duly produced, sworn, and examined, testified on behalf of plaintiffs, as follows:

Direct examination by Mr. JOHNSON:

My name is Albert T. Perkins. I reside at 6365 Ellenwood Avenue, Clayton. William Evans Guy and I married sisters. I knew him slightly before that and have known him intimately, I should say, since 1896.

Q. Did Mr. Guy ever discuss with you how long he expected to live?

A. He repeatedly talked with me about that; in fact, it was a matter of pride in thinking he was going to outlive most of
106 his associates, and he had a good deal of pride in the longevity of his family, his father, grandfather, and so forth. He had said he thought they had lived longer than my own, and my own had lived to a pretty good age.

Q. I will ask you what was the condition, as far as you can tell, of Mr. Guy's health during the last fifteen years of his life?

A. Well, it had changed very slightly. The only impairment of his health, that I know of, was one that existed more or less ever since I had known him, was a slight tendency to neuralgia trouble, that is all.

He was an active man and continued to be so right up to the time he left for Cooperstown in 1928. I imagine I was as intimate a friend as Mr. Guy had. Of course, he is quite a good deal older than I but we had been intimate friends. I was associated with him in various business enterprises. For the last fifteen years of his life Mr. Guy was very active in business affairs and very active in looking after his investments, watching closely the affairs of several syndicates he was in, some of which affairs were very complicated, and which he handled, I think, with a great deal of intelligence. He was usually downtown nearly every day. I used to see him frequently at the office downtown, and he was almost always at the Noonday Club at lunch at noon.

Cross examination by Mr. DYER:

Q. Did Mr. Guy ever discuss with you any of his business relations in regard to making some trusts, creating some trusts for his children?

A. He told me he had made these trusts.

Q. Did he tell you why he had done so?

A. I think he talked that over at times. I don't remember just specifically what he said about it, but my recollection is that he wanted to give them a certain independence, that they were growing up, and he desired to put them in a rather independent position, but I couldn't just quote at this time what he said, because that was a long time ago and the conversations were of a general nature.

Q. Do you recall—you probably won't because it is a good while ago—whether or not Mr. Guy complained of any attack of illness shortly before January 1921?

A. No; I don't remember that he did.

Q. You don't remember whether he did or did not; is that correct? Yes; that is a correct answer. I say, I don't remember whether he did or not.

Mr. DYER. That is all.

107 THOMAS S. MCPHEETERS, a witness of lawful age, being produced, sworn and examined, testified for plaintiffs, as follows:

Direct examination by Mr. JOHNSON:

My name is Thomas S. McPheeters. I am a lawyer associated with the firm of Bryan, Williams, Cave & McPheeters, in St. Louis. I knew Mr. Guy slightly prior to 1923 and very well from 1923 on. Mr. Guy was the surviving syndicate manager of what was called the Little Kanawha Syndicate which had been interested in some coal lands in West Virginia and which had been involved over a period of many years in litigation. From 1923 on I handled all the affairs of that syndicate in connection with Mr. Guy. Mr. Guy was in entire charge of its affairs and very active. There had been litigation which he was very much concerned about and when the litigation was finally determined there were a number of complications and difficulties to iron out and he was the one who had charge of the litigation for the syndicate and that continued down to the time of his death. The situation was unusually complicated and Mr. Guy showed as clear a grasp of it as it was possible for anybody to have. He was active in pursuing the interests of the syndicate right up to the time he left for Cooperstown. I saw him during that period almost every day in regard to some phase of it.

I represented Mr. Guy in connection with a matter in which the Income Tax Unit of the Government sought to assess income taxes against Mr. Guy personally on account of the income of these trusts. Some time around 1927, I think, the Government undertook to assess against him personally for the years 1924, 1925, and 1926 the income from these trust funds, on the theory that these trusts were not—trusts were not good—at least, the income was chargeable against him personally. There was a hearing here and at Washington, and the trusts were held to be valid trusts, and that the income was not assessable against him personally but was assessable against the beneficiaries, which they had returned and paid each year, and that was the end of that.

The COURT. But they collected the estate tax on his estate?

STATE OF [redacted] } ss:
COUNTY OF [redacted]

TYPE OR PRINT

Name of taxpayer or purchaser of stamps [redacted] Executors of the Estate of William Wade Guy, deceased.

Business address [redacted]

Residence

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed [redacted]
2. Period (if for income tax, make separate form for each taxable year) from ....., 19....., to....., 19.....
3. Character of assessment or tax [redacted]
4. [redacted]
5. Date stamps were purchased from the Government [redacted]
6. Amount to be refunded ..... $.....
7. Amount to be abated (not applicable to income or estate taxes) ..... $.....
8. The time within which this claim may be legally filed expires, under Section [redacted] 820 (b) of the Revenue Act of 19[redacted], on ....., 19.....

The deponent verily believes that this claim should be allowed for the following reasons:

1. The above deficiency tax results from the action of the Commissioner of Internal Revenue in including in the gross estate $924,186 representing the value of property transferred by decedent during his lifetime under four separate declarations of trust; in disallowing $[redacted] representing the deductions claimed on account of pledges to religious, charitable and educational organizations made by decedent during his life time and allowed by the Probate Court of the City of St. Louis and paid by his executors; and in disallowing $[redacted] representing deductions claimed on account of executors' commissions ($[redacted] of which have been paid, $[redacted] estimated to be paid on final settlement, this being additional commissions which have been paid or will have to be paid over and above the sum of $[redacted] allowed as a deduction for executor's commissions by the Commissioner of Internal Revenue.
2. Property represented by said $924,186 was not transferred by decedent in contemplation of or intended to take effect in possession or enjoyment at or after his death.

(Attach letter also showing if agent is not attorney)

Sworn to and subscribed before me this

..... day of ....., 193

Signed [redacted] By .....

Executors of the Estate of Wm. Wade Guy, deceased.

(Signature of officer administering oath) (Title)

SEE INSTRUCTIONS ON REVERSE SIDE

Plaintiffs' Exhibit 19

3. Section 302 (c) of Revenue Act 1926 in so far as the same provides that property transferred by a decedent within two years prior to death shall be deemed to have been transferred in contemplation of death whether or not such transfer actually was made in contemplation of death constitutes a taking of property in contravention of the Constitution of the United States and is utterly null and void.

4. That said $2[illegible],841.45 paid by the decedent's executors after claims had been allowed by the Probate Court on account of pledges made by the decedent to religious, charitable and educational organizations during his lifetime represented the payment of claims incurred or contracted bona fide and for adequate consideration in money or moneys' worth within the meaning of Section 303 (a) (1) of the Revenue Act of 1926.

5. That said $8,030.37, $7,448.37 of which has been paid by the estate of decedent to its executors as commission, $582.00 estimated to be paid to the executors as commission, represents the payment of administration expenses within the meaning of Section 303 (a) (1) (b) of the Revenue Act of 1926.

COPY

A. In other words, the Income Tax Unit held they were good trusts, but the Federal Estate Tax Unit has now assessed tax on the theory that the trusts were to take effect in possession or
108 enjoyment, at Mr. Guy's death, and, therefore, were properly part of his estate, and subject to inheritance tax.

Mr. JOHNSON. I believe Mr. Dyer has agreed that it may be stipulated that the payments of taxes, which are alleged in the answer, were paid by the plaintiffs to the defendant, that is, to the collector, pursuant to assessment and notification and demand for payment.

Mr. DYER. That is correct.

CRAWFORD JOHNSON, a witness of lawful age, being duly produced, sworn and examined, testified on behalf of the plaintiffs, as follows:

My name is Crawford Johnson. I am associated with the firm of Bryan, Williams, Cave & McPheeters, and have represented the executors of Mr. Guy's estate in connection with this estate tax. In that regard I filed on behalf of the executors a claim for refund on or about the 11th day of August, 1932, which claim for refund was executed in triplicate and filed with the collector at St. Louis, Missouri.

Plaintiffs' exhibits 19 is a copy of the claim so filed, except for the signatures and the notary public's jurat. The claim as filed was executed in triplicate by Mr. Post as vice president of the St. Louis Union Trust Company, and by Mr. Guy and was sworn to before a notary.

I offer in evidence plaintiffs' exhibit 19.

Mr. DYER. No objections.

Plaintiffs' exhibit 19 is in words and figures, as follows:

113 Plaintiffs' exhibit 20 is a copy of a letter from the Commissioner of Internal Revenue and is an exact copy of the actual letter received, except for certain ink notation which I put there myself in computing the taxes.

Plaintiff's exhibit 21 is an exact copy, including notary's certificate, of the claim filed with the collector of internal revenue on April 17, 1933, for refund of the taxes for which this suit is brought. I filed two claims for the reason that this matter had been under consideration by the Commissioner since some time in 1929 and the only contention made was that the trusts were intended to take effect under section 302–C.

Mr. DYER. I move that be stricken because the pleadings certainly make up the issues in the case and what the issues were prior to the controversy regarding this matter are not material.

The COURT. Overrule this objection.

To which ruling, defendant then and there by his counsel duly excepted.

The claim, a copy of which I have introduced in evidence as exhibit 19, sets out as grounds for recovery that the transfer was not made in contemplation of death and was not to take effect at death.

In the letter rejecting the claim the Commissioner for the first time made some reference to section 302–D which has to do with a power to change the enjoyment of a trust. So, to obviate any question which might be raised by the letter, we filed an additional claim for refund.

Plaintiffs' exhibit 22 was offered and received in evidence without objection, and is as follows:

114

119 *Recital as to evidence*

The defendant did not offer any evidence.

The foregoing was all the evidence offered in the case.

Thereupon the plaintiffs, by their counsel, offered and filed the following request for a declaration of law and prayed the court to declare the law to be as follows:

Declaration of law requested by plaintiffs and refusal thereof

"The court declares the law to be that under the pleadings and admitted facts and the uncontroverted and undisputed evidence adduced by plaintiffs as to the facts not admitted by the pleadings or agreement of parties, plaintiffs are entitled to judgment."

Which said request was thereafter and on the 18th day of May, 1934, by the court refused, and to the action of the court in refusing to give such declaration of law the plaintiffs by their counsel then and there at the time duly excepted.

And thereupon the defendant offered and filed his motion for judgment in his favor, which motion was in words and figures, as follows:

Motion of defendant for judgment in his favor

"Comes now the defendant at the close of all the evidence in the case, and respectfully moves the court to find the issues herein joined in favor of defendant and against the plaintiffs, and to enter judgment for the defendant, for the reason that under the law the defendant is entitled to judgment.

"HARRY C. BLANTON,
"*United States Attorney.*

"GEORGE C. DYER,
"*Assistant United States Attorney,*
"*Attorneys for Defendant.*"

Thereupon plaintiffs filed and offered their motion for judgment in their favor, which said motion is in words and figures, as follows:

120 *Motion of plaintiffs for judgment in their favor*

"Come now plaintiffs in the above-entitled cause and move the court that judgment be entered in favor of the plaintiffs and against

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25 WEST 43RD STREET, NEW YORK

July 28, 1927

Mr. William Evans Guy
Cooperstown, N. Y.

My dear Mr. Guy:

It is a pleasure to be able to tell you that you are holding your own physically very well indeed. There was no organic defect found in the heart, lungs, or abdominal organs and the red coloring matter of the blood was quite satisfactory. The second specimen of urine was normal in all respects.

At your age we think it hardly advisable to try to regulate your diet and daily routine solely by your own efforts and it would be wise for you to be under the periodic careful supervision of your physician. At the present time it is advisable to watch the blood pressure rather carefully and to make an occasional observation of the prostate gland.

There were no menacing defects found by our examiner and we hope when you take the enclosed detailed report to your physician he will agree with us that you approach the age of eighty-three in very good health indeed.

We do not care to make any suggestions about the diet and exercise believing that your own doctor had best advise you in these respects.

We are much interested in your physical condition and hope when you are next examined by the Institute we will be able to render a very good report about your physical condition.

Should you desire further explanation concerning the conditions noted in this letter or the detailed report or as to their relative importance before visiting your physician, we should be glad to have you call at the Institute or write to us.

Very truly yours,

Eugene L. Fisk, M. D.
Medical Director

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ITALY

[illegible], *Professor of [illegible], Neurological Clinic, Naples, Director of [illegible].*

JAPAN

[illegible], *Director of the Institute for Infectious Diseases, Imperial University, Tokyo.*

the defendant, as prayed in plaintiffs' petition, and, as grounds for said motion, say:

"1. That the undisputed, uncontroverted, and unambiguous evidence adduced by plaintiffs supports every allegation of plaintiffs' petition not admitted by the pleadings or stipulation, and admits of no conclusion other than that plaintiffs are entitled to judgment.

"2. That there is no evidence to support a finding or judgment in favor of the defendant.

"3. That under the law plaintiffs are entitled to judgment.

"RHODES E. CAVE,
"THOMAS S. MCPHEETERS,
"CRAWFORD JOHNSON,
"Attorneys for Plaintiffs.
"BRYAN, WILLIAMS, CAVE & MCPHEETERS,
"Of Counsel."

Recital as to action on motions for judgment

And thereupon the court took the case under advisement.

And thereafter, on the 18th day of May, 1934, the court overruled plaintiffs' said motion for judgment in their favor, to which ruling of the court plaintiffs by their counsel then and there at the time duly excepted.

And on said 18th day of May 1934, the court sustained defendant's motion for finding and judgment in his favor, to which ruling of the court plaintiffs by their counsel then and there at the time duly excepted.

And thereafter and on the 18th day of May 1934, the court filed its memorandum containing the court's findings of fact and conclusions of law, and found the issues herein joined in favor of defendant and against the plaintiffs; and the court, on the same day, over the objection and exception of plaintiffs, entered judgment in favor of defendant and against plaintiffs.

And at the trial of said cause such proceedings were had and such rulings by the court were made and such exceptions were taken
121 and saved at the respective times of the several rulings and actions excepted to, as herein indicated in the foregoing pages.

Approval of bill of exceptions by district judge and counsel

For as much as the matters and things above set forth do not appear of record, said plaintiffs, St. Louis Union Trust Company and William Edwin Guy, executors of the estate of William Evans Guy, deceased, tender and present the foregoing as their bill of exceptions in said cause, and pray that the same may be settled, signed, allowed, and sealed, and that the testimony which is set out in the form of questions and answers be permitted to be so set out

instead of in narrative form and be made a part of the record in this cause, pursuant to the law in such cases.

Which is accordingly done and ordered by the court on this 9th day of July 1934.

CHARLES B. DAVIS,
Judge of the District Court of the United States for the Eastern Division of the Eastern District of Missouri.

The foregoing bill of exceptions has been examined and is hereby aproved by

RHODES E. CAVE,
THOMAS S. MCPHEETERS,
CRAWFORD JOHNSON,
Attorneys for Plaintiffs.
BRYAN, WILLIAMS, CAVE & MCPHEETERS,
Of Counsel.

HARRY C. BLANTON,
United States Attorney,
By GEORGE C. DYER,
Assistant United States Attorney,
Attorneys for Defendant.

122 [Clerk's certific. e to foregoing transcript omitted in printing.]

123 [Appearances of counsel omitted in printing.]

124 In United States Circuit Court of Appeals

Order of submission

December 12, 1934

This cause having been called for hearing in its regular order, the same was argued by Mr. Crawford Johnson for appellants and by Mr. Morton K. Rothschild, special assistant to the Attorney General, for appellee.

Thereupon, this cause was submitted to the court on the transcript of the record from said district court and the briefs of counsel filed herein. Upon application Mr. Johnson is granted leave to file typewritten reply brief for appellant.

125 In United States Circuit Court of Appeals, Eighth Circuit

No. 10,078. March term, A. D. 1935

ST. LOUIS UNION TRUST COMPANY, A CORPORATION, AND WILLIAM Edwin Guy, Executors of the Estate of William Evans Guy, Deceased, appellants

vs.

LOUIS J. BECKER, COLLECTOR OF INTERNAL REVENUE, APPELLEE

Appeal from the District Court of the United States for the Eastern District of Missouri

Mr. Crawford Johnson (Mr. Rhodes E. Cave, Mr. Thomas S. McPheeters, Messrs. Duryee, Zunino & Amen, and Messrs. Bryan, Williams, Cave & McPheeters, were with him on the brief), for appellants.

Mr. Morton K. Rothschild, special assistant to the Attorney General (Mr. Frank J. Wideman, Assistant Attorney General, Mr. Sewall Key and Mr. Carlton Fox, special assistants to the attorney General, Mr. Harry C. Blanton, United States attorney, and Mr. Herbert H. Freer, assistant United States attorney, were on the brief), for appellee.

Before GARDNER, SANBORN, and VAN VALKENBURGH, Circuit Judges

Opinion

March 13, 1935

126 SANBORN, Circuit Judge, delivered the opinion of the court.

This is an appeal from a judgment in favor of the appellee in an action at law brought by the appellants to recover $94,022.35 paid by them to the appellee under protest as estate taxes.

The facts—as to which there is virtually no dispute—are as follows:

William Evans Guy, on January 3, 1921, executed four separate written declaration- of trust, one for each of his four children, who at that time had reached their majority. By each of the trust instruments be conveyed to himself, as trustee, certain securities of the par value of $72,000, the aggregate value of the securities at that time being $288,000. From time to time thereafter he made additions to these trusts, and at the time of his death on July 24, 1928, the total value of the trust property included in the four trusts was $994,195. This amount the Commissioner of Internal Revenue included as a part of the gross estate of the decedent, under Revenue Act of 1926, section 302 (26 U. S. C. §1094), and the appellants,

his executors, after paying the additional estate tax which resulted, brought this action to recover it.

The four declarations of trust were identical with the exception of the name of the beneficiary. The declaration of trust for Evelyn S. Guy is typical of each of the trusts, and, so far as pertinent, is as follows:

"I, William Evans Guy, of the city of St. Louis, and State of Missouri, hereby declare, this third day of January 1921, that I hold in trust for my daughter, Evelyn S. Guy, the following property, to-wit:"

[Here follows description of securities];

"with the powers and for the uses and purposes hereinafter set forth, as follows:

"1. I am to have the power at any time, and from time to time, to sell any of the trust property or estate, for such price and prices as I may determine. Any money coming into my hands as the proceeds of any such sale or otherwise and forming a part of the principal of said trust estate shall as soon as practicable, be
127 reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted to the purchase of such property as is ordinarily deemed advisable for trust property. I am, likewise, to have the power to rent or lease any and all real estate which may be included in said trust property for terms of any duration, whether such terms shall extend to a time beyond the termination of this trust or not. I am, likewise, to have full power and authority in my discretion to borrow money and secure the sums so borrowed by pledge or mortgage of any and all portions of said trust estate and I may, out of the corpus or income of said trust estate, or out of both such corpus and income, repay the sums so borrowed. I am to have full authority to invest or reinvest any sums so borrowed; and to collect and receive the rents, income, and profits arising from the trust estate therein created. It being my intention to retain *as trustee* [italics ours] such rights, power, and authority in respect to the management, control, and disposition of said trust estate for the use and benefit of the beneficiary as I have with respect to property absolutely owned by me.

"2. Out of the income and revenue accruing from said trust estate I shall have power to pay all taxes, expenses necessarily or properly incident to its care, preservation, and management; and all other reasonable or necessary charges incident to the administration of the trust created hereby, and out of the remaining income and revenue, I am to pay the beneficiary of this trust an allowance of $300.00 a month, with power in my discretion from time to time to increase or decrease the said allowance whenever I may deem it to be to the best interest of the said beneficiary, to have such allow-

ance increased or decreased. I shall have the power, from time to time, out of the remainder of said income and revenue, to appropriate and pay such sums as I may deem reasonably necessary for the maintenance, support, and education of said beneficiary. Any income not distributed as hereinabove provided shall be added to the principal of the trust estate.

"3. In case of an emergency, or illness of said beneficiary requiring a greater sum than that accruing as income or revenue, I
128 shall have power to use as much of the principal of said trust estate as may be absolutely necessary.

"4. Any receipt given by the beneficiary of this trust to me for any sum paid to her by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

"5. The foregoing provisions for my said daughter, Evelyn S. Guy, shall be for her sole and separate use, free from all statutory and marital rights of her husband; and free from her debts and without the right on her part to assign, pledge, hypothecate, or anticipate, or in any way create a lien upon any of the income or corpus of the trust estate hereby created before she shall receive the same, nor shall any of the said income or corpus be subject to any claims of any persons who may at any time be creditors of my said daughter.

"6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease.

"(Signed) WILLIAM EVANS GUY.

"Witness:
"WM. EDWIN GUY."

In 1921, at the time these trusts were made, Mr. Guy was 76 years of age. Long prior to that time he had retired from the active management of any corporations in which he was interested, but he conducted his own affairs, which were extensive, and continued as a director of the St. Louis Cold Storage Company, the Laclede Steel Company, and as trustee and director in several syndicates. He maintained a downtown office, where he went every business day when the weather was good, from September to June, which was the portion of the year that he spent in St. Louis. He took an active interest in all matters with which he was connected. He made a practice of consulting his physician on an average of about once in six months, and enjoyed almost perfect health for a man of his years. He had not consulted his physician for some time prior to the date of the execution of the trusts, so far as the
129 physician could remember. In June 1928, about two months prior to his death, he had had a physical examination, which

disclosed no change in his condition. He was an optimistic and cheerful man, and exceptionally alert mentally. He came of a long-lived family, and frequently had made the statement that he expected to live to be at least ninety. It seems that two of his immediate ancestors had lived beyond that age. None of his friends knew of any ailment which might have led him to suspect that his death was to be expected in the near future. He was careful of his health, but obviously not concerned about death. In fact, the evidence indicates that he was, at the time these trusts were executed, in as good physical and mental condition as possible for any man of his years. His purpose in making the four trusts, as expressed to his son (who drafted the instruments) and to at least one of his friends, was to make his children independent of him, to enable them to know what they might expect each year, in lieu of an allowance out of his own income, and to avoid the high surtax which would be imposed upon his income if he retained his property for himself.

The action was tried to the court below without a jury. Two questions were presented:

1. Was the transfer of the property included in these four trusts intended to take effect in possession or enjoyment at or after death?

2. Were the transfers made in contemplation of death?

The court below found that none of the beneficiaries named in the trust instruments acquired custody, control, or title to the corpus of the trust prior to the death of the settlor; that the title of the beneficiaries was contingent upon their survival of the settlor; and that the motive for the creation of the trusts was to decrease the settlor's income taxes by distributing the property and thus avoiding the high rate for large incomes, and at the same time to make provision for the distribution of the property included in the trusts at the settlor's death. The court concluded that the corpus of the trusts was transferred in contemplation of death, that the transfers were intended to take effect in possession and enjoyment
130 at and after death, and that the value of the trust property was therefore properly included in the gross estate.

It was the contention of the appellee, collector of internal revenue, in the court below, and is his contention here, that the death of the settlor, rather than the trust instruments, constituted the generating source of title in the beneficiaries, since the final receipt and complete enjoyment of the trust property by them was contingent upon their surviving the settlor.

The pertinent provisions of the Revenue Act of 1926 are as follows:

Sec. 302, c. 27, 44 Stat. 9, 70 (26 U. S. C. § 1094). "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * * * *

"(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title; * * *"

131 In considering the question whether the transfer of the corpus of these trusts was intended to take effect in possession or enjoyment at or after death, it must be remembered that the Federal estate tax is a tax on the transfer of property from the dead to the living, and not a tax upon the privilege of the living to succeed to the property of the dead. It is a transfer tax and not a succession tax. Young Men's Christian Association of Columbus, Ohio, et al., v. Davis, et al., 264 U. S. 47, 50; Edwards v. Slocum, et al., 264 U. S. 61, 62; Nichols v. Coolidge, et al., Executors, 274 U. S. 531, 537, 541; Ithaca Trust Company, Executor and Trustee, v. United States 279 U. S. 151, 155; Reinecke v. Northern Trust Company, 278 U. S. 339, 347; May, et al., Executors, v. Heiner, 281 U. S. 238, 244; Saltonstall, et al., v. Saltonstall, et al., 276 U. S. 260, 270; Chase National Bank, et al., v. United States, 278 U. S. 327, 334.

With that principle in mind, the Supreme Court has construed many trust instruments and has held that those absolutely and irrevocably vesting the corpus in a beneficiary prior to the death of the settlor, and not made in contemplation of death, were not subject to the tax imposed by section 302 (c) of the Revenue Act of 1926, and the similar provisions of other revenue acts, even though the benefits derived thereunder upon the death of the settlor would have been taxable under laws imposing a succession or inheritance tax such as those in force in some of the States.

In Shukert, et al., Executrices, v. Allen, 273 U. S. 545, there was an attempt to impose an estate tax under Section 402 (c) of the Revenue Act of 1919. The property, the value of which was sought

to be included in the gross estate, had been transferred by the testator on May 5, 1921, to a trust company to accumulate the income therefrom (subject to small deductions in case of extreme destitution of the testator's wife or of any of the beneficiaries named) until February 1, 1951, unless the last of the beneficiaries should have died more than twenty-one years before that date, and then to divide the principal and undistributed income among the three children of the testator. The question was whether the trust was one intended to take effect in possession or enjoyment after the testator's death. Mr. Justice Holmes, speaking for the court, said (pages 547, 548 of 273 U. S.):

132 "The transfer was immediate and out and out, leaving no interest remaining in the testator. The trust in its terms has no reference to his death but is the same and unaffected whether he lives or dies. Although the Circuit Court of Appeals seems to have thought otherwise, the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested as to any one of them in favor of his issue if any, or of the surviving beneficiaries, if he died before the termination of the trust. * * * There certainly is no transfer taking effect after his [the testator's] death to be taxed under §401.

"It is not necessary to consider whether the petitioner goes too far in contending that §402 (c) should be construed to refer only to transfers of property the possession or enjoyment of which does not pass from the grantor until his death. But it seems to us tolerably plain, that when the grantor parts with all his interest in the property to other persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated *for them instead of being handed to them to spend*, [italics ours] does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death."

In Nichols v. Coolidge, et al., Executors, supra, 274 U. S. 531, the Supreme Court considered an attempt to tax, as part of an estate, property which had been conveyed in a trust instrument executed in 1907. The trust deed conveyed the property of Mr. and Mrs. Coolidge to trustees, to pay the income to the settlors, then to the survivor of them, and, after his or her death, to distribute the corpus to the settlors' five children. The trustees were authorized, among other things, to sell the trust property and to make and change investments. In 1917 the settlors assigned to their children their entire interest in the trust property, including the right to receive the income therefrom. Upon the death of the survivor of the settlors, a tax was assessed under §402 (c) of the Revenue Act of 1918, upon the trust property. The tax was paid and an action was brought to recover it. Section 402 (c) was in substance the same as the section with which we are here concerned. The court, in holding that the tax was wrongfully assessed, said (pages 542–543 of 274 U. S.):

133 "And we must conclude that § 402 (c) of the statute here under consideration, insofar as it requires that there shall be included in the gross estate the value of property transferred by a decedent prior to its passage merely because the conveyance was intended to take effect in possession or enjoyment at or after his death, is arbitrary, capricious, and amounts to confiscation."

In Reinecke v. Northern Trust Company, supra, 278 U. S. 339, the Supreme Court reviewed a decision of the Seventh Circuit affirming a judgment of the district court, which had allowed recovery of taxes assessed and collected under section 402 (c) of the Revenue Act of 1921, which section is similar to section 302 (c) of the Revenue Act of 1926, here involved, except that it specifically provided that the tax was to be imposed whether the transfer or trust was made or created before or after the passage of the act. Five of the trusts involved in that case were made in 1919, and created life interests in income with remainders over. In one of the trusts the life interest was terminable five years after the death of the settlor or on the death of the designated life beneficiary should she survive. In the others, life interests in the income were created, terminable five years after the settlor's death or on the death of the respective life tenants, whichever should happen first. The settlor reserved to himself power to supervise the reinvestment of trust funds, to require the trustee to execute proxies to his nominee, to control all leases executed by the trustee, and to appoint successor trustees. In these five trusts the power was reserved to "alter, change, or modify the trust", which was to be exercised, in the case of four of them, by the settlor and a single beneficiary of each trust acting jointly, and, in the case of one of the trusts, by the settlor and a majority of the beneficiaries named, acting jointly. In determining that the rights of the beneficiaries in the five trusts were vested by the trust instrument, and that the trust property was not subject to the estate tax, Mr. Justice Stone, speaking for the court, said (pages 346, 347, 348 of 278 U. S.):

"If it be assumed that the power to modify the trust was broad enough to authorize disposition of the trust property among new beneficiaries or to revoke the trusts, still it was not one vested in the settlor alone, as were the reserved powers in the case of the two trusts. He could not effect any change in the beneficial inter-
134 est in the trusts without the consent, in the case of four of the trusts, of the person entitled to that interest, and in the case of one trust without the consent of a majority of those so entitled. Since the power to revoke or alter was dependent on the consent of the one entitled to the beneficial, and consequently adverse, interest, the trust, for all practical purposes, had passed as completely from any control by decedent which might inure to his own benefit as if the gift had been absolute.

"Nor did the reserved powers of management of the trusts save to decedent any control over the economic benefits or the enjoy-

ment of the property. *He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete.* [Italics ours.] The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased *and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax.* [Italics ours.]

"But the question much pressed upon us remains, whether, the donor having parted both with the possession and his entire beneficial interest in the property when the trust was created, the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen after the testator's death, as directed, and after the enactment of the statute, is included within its taxing provisions. * * *

"One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are asked to say that this statute means that he may not make a gift inter vivos, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death. It would require plain and compelling language to justify so incongruous a result and we think it is wanting in the present statute.

"* * * In the light of the general purpose of the statute and the language of § 401 explicitly imposing the tax on net es-
135 tates of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in § 402 (c) 'to take effect in possession or enjoyment at or after his death', include any others than those passing from the possession, enjoyment, or control of the donor at his death and so taxable as transfers at death under § 401. That doubt must be resolved in favor of the taxpayer."

In May et al., Executors, v. Heiner, supra, 281 U. S. 238, 243, the Court considered whether Mrs. May's estate was liable for estate taxes on property conveyed by her in 1917 to trustees, to pay the income to her husband for life, then to Mrs. May during her lifetime, with remainder to her four children. The taxes were imposed under §402 (c) of the 1918 act. The Supreme Court held that whether Mrs. May predeceased her husband was of no consequence, since "at the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possessed immediately prior to her death was obliterated by that event." The Court held that the executors were entitled to a refund of the tax.

Coolidge et al., Trustees, v. Long, Commissioner of Corporations and Taxation of Massachusetts, 282 U. S. 582, involved a trust deed which had previously been considered by the Court in Nichols v. Coolidge, et al., supra, 274 U. S. 531. By this trust deed a large amount of property had been transferred from the settlors to trustees. Income from the trust was to be paid to the settlors during their lives, according to the proportion in which each contributed to the trust, and the entire income was to go to the survivor, and upon his or her death the principal was to be divided equally among the five sons of the settlors. It was provided that if any of the sons predeceased the survivor of the settlors, his share should go to those entitled to take under the statutes of distribution in force at the time of the death of the survivor. No power of revocation, modification, or termination of the trust existed prior to the death of the survivor of the settlors. All of the five sons eventually survived the settlors, one of whom died in January 1921 and the other on November 10, 1925. Excise taxes were assessed under the
136 Massachusetts statute, effective subsequent to January 1, 1921, which provided that "all property within the jurisdiction of the Commonwealth * * * which shall pass by * * * deed, grant, or gift, except in cases of a bona fide purchase for full consideration in money or money's worth * * * made or intended to take effect in possession or enjoyment after his [grantor's] death * * * to any person, absolutely or in trust, * * * shall be subject to a tax * * *." This statute was made applicable only to property or interests passing or accruing upon the death of persons dying on or after May 4, 1920. The Massachusetts Supreme Court had sustained the exaction of the tax upon the theory that the possession or enjoyment upon the death of the survivor of the settlors was taxable under the statute enacted after the creation of the trust. The Supreme Court said (pages 597–598 of 282 U. S.):

"By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons subject to be divested only by his death before the death of the survivor of the settlors. It was a grant in praesenti to be possessed and enjoyed by the sons upon the death of such survivor. * * * The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust. Coolidge v. Loring, supra [235 Mass. 220], 223. Upon the happening of the event specified without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen. Knowlton v. Moore, 178 U. S. 41, 56. Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. *The rights of the remain-*

dermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors." [Italics ours.]

On page 599 the opinion continues:

137 "No act of Congress has been held by this Court to impose a tax upon possession and enjoyment, the right to which had fully vested prior to the enactment."

And on pages 605 and 606 the Court says in conclusion:

"We conclude that the succession was complete when the trust deeds of Mr. and Mrs. Coolidge took effect and that the enforcement of the staute imposing the excise in question would be repugnant to the contract clause of the Constitution and the due process clause of the fourteenth amendment. * * *"

Mr. Justice Roberts, in an opinion concurred in by Mr. Justice Holmes, Mr. Justice Brandeis, and Mr. Justice Stone, dissented upon the ground that the Massachusetts statute sought to tax the privilege to succeed and enjoy, rather than the privilege to transfer, and that such privilege of succession was not fully exercised until after the death of the surviving settlor, when the taxing statute was in force. On page 631 (of 282 U. S.) the following language is found in the dissenting opinion:

"Of course the test to be applied in cases arising under the Federal estate tax law is whether the transferor has parted with every vestige of control over the beneficial enjoyment and possession of the property, and not whether the beneficiary has received it. Nichols v. Coolidge (274 U. S. 531) dealt, under the Federal estate tax law, with the same trust involved in this case, and the inquiry there necessarily was whether prior to the passage of the estate tax act the grantors had so fully divested themselves of all right of control and enjoyment of the property that nothing remained to pass out of them at death. The facts were held to make an affirmative answer imperative. Here, on the other hand, we inquire, not whether the grantor has parted with title, control and enjoyment, but whether the grantee has fully acquired them prior to the passage of the law."

The case of Burnet v. Northern Trust Co., Executor, 283 U. S. 782, involved a tax imposed under section 402 (c) of the Revenue Act of 1921. The trust deed there involved provided that the trustee should pay the entire net income to the settlor for life; that

after her death the trustee was to pay such income equally to

138 her four children for life; that, upon the death of a child leaving lawful issue, the share of such child should be paid to his or her lawful issue per stirpes until the period of distribution. The distribution date was fixed. The Circuit Court of Appeals for the Seventh Circuit (41 F. (2d) 732) held that the transfer was not taxable, notwithstanding the income was payable to the settlor for

life; and the Supreme Court affirmed that decision on the authority of May v. Heiner, supra, in a per curiam opinion.

Morsman, Administrator, v. Burnet, 283 U. S. 783, involved a tax imposed under section 302 (c) of the 1924 Revenue Act (which is in substance the same as the section here under consideration). The Supreme Court, in a per curiam opinion, based on May v. Heiner, supra, reversed a decision of this court (44 F. (2d) 902) which held that the value of a trust estate set up by the decedent in 1922 was properly included in the gross estate where the settlor had reserved the income therefrom to himself for life.

McCormick et al., Executors, v. Burnet, 283 U. S. 784, involved a tax imposed under section 402 (c) of the Revenue Act of 1921. A decision of the Seventh Circuit (43 F. (2d) 277) that a transfer under a trust agreement executed in 1918, providing for its termination upon the election of the settlor and one of the three beneficiaries, and for the reversion of the trust estate to the settlor if she survived the beneficiaries, was taxable as a transfer intended to take effect in possession or enjoyment at or after death, was reversed on the authority of May v. Heiner, supra.

In Burnet v. Guggenheim, 288 U. S. 280, it was held that revocable deeds of trust made in 1917 became taxable as gifts in 1925, when the power of revocation was cancelled, because that was the time when there was a change of economic benefits.

In Helvering v. Duke et al., 290 U. S. 591, the Supreme Court affirmed, without opinion, upon an equal division of the Court (Mr. Chief Justice Hughes having taken no part) a decision of the United States Court of Appeals for the Third Circuit holding transfers of property conveyed in two trusts not taxable as intended to take effect in possession or enjoyment at or after death, within section 302 (c) of the 1924 act. In both of these trusts the settlor in 1917 conveyed to himself as trustee, for the benefit
139 of his minor daughter and her descendants, the personal property described in the trust instruments. The instruments also provided for successor trustees. The settlor reserved no power to alter or revoke, and the trust property was to revert to him only in the event that the beneficiary died prior to his death. The settlor, as trustee, had full power to manage the trust property. Provision was made for the termination of the trusts after the settlor's death, and the transfer of parts of the corpus of the trust to the beneficiary as she reached certain ages. The settlor died in 1925. The Board of Tax Appeals, in its decision (23 B. T. A. 1104), which was affirmed by the Third Circuit (62 F. (2d) 1057) held that the trust agreements were the generating sources of title, and that nothing passed from the settlor at death, notwithstanding that he held the property himself as trustee and that there was a possibility during his lifetime of a reversion of the fee to him in case the beneficiary should predecease him.

Klein v. United States, 283 U. S. 231, upon which the appellee strongly relies, dealt with a transfer by deed, in which the grantor had conveyed a life estate in real property to his wife, expressly reserving to himself the fee, which was to "remain vested in said grantor" in the event that the grantee "shall die prior to the decease of said grantor", but was to pass to the grantee if she survived him. In holding that the transfer was taxable under section 402 (c) of the Revenue Act of 1918, as a tranfer intended to take effect in possession or enjoyment at or after death of the grantor, the court said (page 234 of 283 U. S.):

"It is perfectly plain that the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed."

The appellee is of the opinion that the case with which we are concerned falls within the rule of the Klein case, upon the theory that Mr. Guy transferred to himself, as trustee, only a life interest in the corpus of each of the four trusts, for the purpose of providing income for his children, and that the provisions in the trust instruments that the beneficiaries should take the property only
140 in the event they survived the settlor, had the effect of preventing the passage of title to them until the death of the settlor. This same contention was made in the case of Helvering v. St. Louis Union Trust Company, et al. (C. C. A. 8), * * * F. (2d) * * *, opinion filed January 17, 1935. We said in that case:

"Had the decedent in the case at bar retained the legal title to all of the trust property, and had he provided that, upon his death, and not before, such title should pass to his daughter or to others or to a trustee for her or their benefit, the situation would be comparable to that in the Klein case; but here the decedent parted with the legal title to the trust property and to all beneficial interest therein during the life of the trust, and did so irrevocably. It was only in the case of the happening of certain contingencies over which he had no control, that the property would revert to him. One of these contingencies was the death of his daughter prior to his death, while the trust still continued; and the second was a termination by the trustee of the trust during the lifetime of the grantor. Neither of these contingencies occurred, and there was, during the decedent's lifetime nothing more than a possibility that either would occur. In no proper sense was there an enlargement of the interests of the beneficiaries of the trust resulting from the death of the decedent. That event merely changed the possibility that the property would revert to him into an impossibility. The distinction between the Klein case and this case, as we see it, is that in the former the legal title was retained by the grantor and passed to the grantee with the grantor's death, while here the grantor

parted with the title and all beneficial interest in the property, and retained no right with respect thereto that would pass to anyone as the result of his death. In the Klein case, death was the generating source of title, while in this case the trust instrument was the source of title, and death merely destroyed a possibility that the trust property might revert to the grantor."

It will be noted that in Reinecke v. Northern Trust Co., supra, 278 U. S. 339, the opinion in which was written by Mr. Justice Stone, it was said (pages 347–348):

"One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax, but we are
141 asked to say that this statute means that he may not make a gift inter vivos, equally absolute and complete, without subjecting it to a tax if the gift takes the form of a life estate in one with remainder over to another at or after the donor's death."

Hence, decisions relating to gifts inter vivos, even though such gifts are not in the form of trusts, are pertinent.

In Edson v. Lucas (C. C. A. 8), 40 F. (2d) 398, it appeared that Mrs. Edson had given to her daughter, Mrs. Pratt, certain stocks, with provision that if Mrs. Edson or her husband survived Mrs. Pratt, the securities should revert. It was sought to tax a gain which resulted from the sale of the stock transferred to Mrs. Pratt, as income of Mrs. Edson. We held that, notwithstanding the provision that the stock was to revert to Mrs. Edson in case of Mrs. Pratt's death, the gift was complete; and in that connection said (page 405 of 40 F. (2d)):

"It is safe to say that, where there is a complete transfer of the legal title to the subject matter of the gift, together with some equitable or beneficial present interest, to the donee, without power of revocation in the donor, coupled with the intentional delivery of complete possession, dominion, and control over the gift, the gift is not invalid because of conditions imposed by the donor which are not inconsistent with the immediate vesting of such legal title in the donee."

We referred in that case to Peoples Trust Co. v. Dickson, 126 Misc. Rep. 580, 214 N. Y. S. 73, which held that a provision that a gift should be subject to defeasance by the death of the donee before that of the donor would not defeat the gift. It appeared, however, in that case that the donor had transferred merely the possession of 90 shares of Bethlehem Steel common stock, assigned in blank, to his wife, on condition that she hold the stock until after his death, and that it should then become her personal property. It was held that this negatived any intent to make an immediate gift of this stock. The Dickson case, we think, is analogous to the Klein case, where Mrs. Klein received, in effect, the possession and enjoyment of real estate, the title to which remained in her husband during his lifetime and passed to her only upon his death. On the other hand,

142 the case of Edson *v.* Lucas is, in our opinion, analogous to the case at bar, as is also the case of Flint v. Ruthrauff, 26 App. Div. 624, 53 N. Y. S. 206, affirmed 163 N. Y. 588, 57 N. E. 1109. There it appeared that a gift of certain bonds was made by Miss Flint to Miss Ruthrauff, with the understanding or qualification that Miss Flint should have some of the income therefrom and that the gift should be entirely defeated in case Miss Ruthrauff's death occurred before the death of Miss Flint. It was held that the gift was a valid one, notwithstanding the provision for defeasance.

We are advised by the opinion of Mr. Justice Stone in the case of Reinecke v. Northern Trust Co., supra, that the fact that a settlor makes himself a trustee under the trust instrument with the power of management of the trust, would not make the transfer incomplete. We are advised by the opinion of Mr. Justice Holmes, in the case of Shukert v. Allen, supra (273 U. S. 545), that the fact that income of a trust is to be accumulated for the benefit of the beneficiaries therein named, instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death. We are advised by the dissenting opinion of Mr. Justice Roberts in Coolidge et al., Trustees, v. Long, Commissioners of Corporations and Taxation of Massachusetts, supra, 282 U. S. 582, 631, concurred in by three other Justices and in no way disputed by the majority opinion, that "the test to be applied in cases arising under the Federal estate tax law is whether the transferor has parted with every vestige of control over the beneficial enjoyment and possession of the property, *and not whether the beneficiary has received it.*" Under the circumstances, we cannot hold that the fact that Mr. Guy made himself a trustee with power to manage the trust property or that he reserved the right to control the amount of income which should be paid to the beneficiaries during the continuance of the trust, or that the beneficiaries were to receive the trust property at his death, prevented the transfer from becoming complete at the time the trust instruments were executed.

It seems, then, that the question as to whether the transfer was one to take effect in possession or enjoyment at or after Mr. Guy's death depends entirely upon whether by the trust instruments he, as an individual, parted with every vestige of control over the

143 beneficial enjoyment and possession of the property conveyed. In order to sustain the conclusion of the lower court that he, as an individual, retained some vestige of control over the beneficial enjoyment and possession of the trust property until his death, we would be obliged to point out what it was that he retained. It is clear that the legal title to the trust property passed from him upon the execution of the trust instruments. The possession of the trust property which he had formerly held as an individual he thereafter held as a trustee. The income from the trust property was no longer his. He was obliged either to pay the income over to

the beneficiaries or to accumulate it for them. The powers with which he clothed himself as trustee were not to be exercised by him for his own benefit, but only for the benefit of those for whom he had constituted himself trustee. The only interest, then, which he retained was the right to have the trust property revert to him in case the beneficiaries should predecease him. That right to the reversion was not an interest which passed to the beneficiaries as the result of Mr. Guy's death. It was merely an interest which was obliterated by his death. It passed not to the living, but entirely out of existence. So far as we can discern, the rights of the beneficiaries to the trust property were complete at the time the declarations of trust were executed. Thereafter Mr. Guy as an individual had no interest in the property then or thereafter held by him as trustee, except the right to a reversion on certain conditions over which he had no control. Hence, nothing could have passed from him to the beneficiaries of the trust at the time of his death, although that event, by virtue of the terms of the declarations of trust, gave them the rights with respect to his property which the declarations of trust provided they should have if they survived him.

It is true, as the appellee says, that "taxation is not so much concerned with the refinements of title as it is with the actual command over the property taxed—the actual benefit for which the tax is paid." Burnett v. Guggenheim, 288 U. S. 280, 283; Corliss v. Bowers, 281 U. S. 376, 378. However, in the case of estate taxes, the actual benefit for which the tax is paid must be a benefit which passes from the dead to the living, and where a complete transfer is made prior to death, the transferor certainly retains no "actual benefit" justifying the imposition of the tax.

144 The appellee also contends that the cases which we have referred to can be distinguished from the case at bar on the ground that the transfers in those cases were intended to take effect in possession or enjoyment after death, whereas [illegible] they were intended to take effect in possession or enjoyment at [illegible]th. The statute, however, deals with transfers intended to take effect in possession or enjoyment "at *or* after" death. This precludes the drawing of any distinctions between trusts which terminate at death and those which terminate after death, where the transfers are complete and irrevocable during the life of the settlor.

We reach the conclusion, therefore, that the property transferred under these declarations of trust was not a part of the estate of Mr. Guy at the time of his death, unless the transfers were made in contemplation of death.

The appellee's theory is that the actual transfer of the corpus of these trusts to the beneficiaries was accomplished by the death of the settlor, and that any motive he may have had in transferring the property to himself as trustee, to distribute the income to his children, is disconnected with the ultimate transfer, which was subject to the presumption that it was made in contemplation of death, under section 302(c). Since we have held that the transfer was com-

plete at the time of the execution of the trust instruments, more than seven years prior to the death of the settlor, that theory is, of course, untenable, and the statutory presumption respecting transfers made within two years prior to death is not applicable.

Whether a transfer is made in contemplation of death must obviously be determined from the facts of each particular case.

In Milliken et al., Executors, v. United States, 283 U. S. 15, the court said, with reference to gifts made in contemplation of death (page 23):

"It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with testamentary dispositions, for which
145 they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. It is thus an enactment in aid of, and an integral part of, the legislative scheme of taxation of transfers at death."

In United States v. Wells, et al., Executors, 283 U. S. 102, the Supreme Court affirmed a decision of the Court of Claims holding that certain gifts were made in contemplation of death. The gifts were to the decedent's wife and children at dates ranging from approximately seven months to almost two years prior to his decease. The evidence showed that, during this period, the decedent was undergoing medical treatment, but was in a fair state of health and had no reason to expect death in the near future. In the opinion by Mr. Chief Justice Hughes, the following language is used (pages 117, 118, 119, of 283 U. S.):

"Death must be 'contemplated', that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. As a condition of body or mind that naturally gives rise to the feeling that death is near, that the donor is about to reach the moment of inevitable surrender of ownership, is most likely to prompt such a disposition to those who are deemed to be the proper objects of his bounty, the evidence of the existence or nonexistence of such a condition at the time of the gift is obviously of great importance in determining whether it is made in contemplation of death. * * *

"As the test, despite varying circumstances, is always to be found in motive, it cannot be said that the determinative motive is lacking merely because of the absence of a consciousness that death is imminent. It is contemplation of death, not necessarily contemplation of imminent death, to which the statute refers. It is conceivable that the idea of death may possess the mind so as to furnish a controlling motive for the disposition of property, although death is not thought to be close at hand. Old age may give premonitions and promptings independent of mortal disease. Yet age in itself

cannot be regarded as furnishing a decisive test, for sound health and purposes associated with life, rather than with death, may motivate the transfer. The words 'in contemplation of death' mean that the thought of death is the impelling cause of the transfer, and while the belief in the imminence of death may afford convincing evidence, the statute is not to be limited, and its purpose thwarted, by a rule of construction which in place of contemplation of death makes the final criterion to be an apprehension that death is 'near at hand.'

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"If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts inter vivos which spring from a different motive. * * * The purposes which may be served by gifts are of great variety. It is common knowledge that a frequent inducement is, not only the desire to be relieved of responsibilities, but to have children, or others who may be the appropriate objects of the donor's bounty, independently established with competencies of their own, without being compelled to await the death of the donor and without particular consideration of that event. There may be the desire to recognize special needs or exigencies or to discharge moral obligations. The gratification of such desires may be a more compelling motive than any thought of death.

"It is apparent that there can be no precise delimitation of the transactions embraced within the conception of transfers in 'contemplation of death', as there can be none in relation to fraud, undue influence, due process of law, or other familiar legal concepts which are applicable to many varying circumstances. There is no escape from the necessity of carefully scrutinizing the circumstances of each case to detect the dominant motive of the donor in the light of his bodily and mental condition, and thus give effect to the manifest purpose of the statute."

In Willcuts v. Stoltz (C. C. A. 8), 73 F. (2d) 868, Judge Booth has carefully reviewed many cases dealing with the subject. That case held that a finding that gifts made to the testator's son, for the declared purpose of reducing the testator's income taxes and giving the son a real working interest in the testator's business, and gifts to the testator's wife's sister soon after the wife's death, pursuant to a formerly expressed desire to make the sister a gift, were not made in contemplation of death within section 302 (c) of the Revenue Act of 1926, was justified by the evidence.

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In the case of Flannery v. Willcuts (C. C. A. 8), 25 F. (2d) 951, this court set aside a finding of the lower court that transfers in trust made by Mrs. James J. Hill shortly prior to her death were made in contemplation of death, on the ground that there was no substantial evidence to sustain such finding, although Mrs. Hill was, at the time the transfers were made, well advanced in years and not in good health.

According to the evidence, Mr. Guy, in making these trusts, was actuated by two motives: (1) To make his children independent;

(2) to avoid high surtaxes upon his income. Both of these motives were intimately associated with life. United States v. Wells, et al., Executors, supra, 283 U. S. 102; Willcuts v. Stoltz, supra, 73 F. (2d) 868. Evidence that Mr. Guy was in any way influenced in what he did by the thought of death is entirely lacking.

The suggestion of the appellee that the determination by the Commissioner that the transfers were made in contemplation of death would support the lower court's finding to that effect, is obviously unsound. Any presumption as to the correctness of the Commissioner's determination is a rebuttable one and would only support such a finding in the absence of any substantial evidence to the contrary. Willcuts v. Stultz, supra, 73 F. (2d) 868, 872; Flannery v. Willcuts (C. C. A. 8), supra, 25 F. (2d) 951; Brown et al v. Commissioner (C. C. A. 10), 74 F. (2d) 281; Lippincott et al v. Commissioner (C. C. A. 3), 72 F. (2d) 788. Our conclusion that there is no substantial evidence that Mr. Guy made these transfers in contemplation of death finds strong support in the two recent cases last cited.

Because of the feeling of uncertainty occasioned by the equal division of the Justices of the Supreme Court in Helvering v. Duke, supra, we have in this opinion reviewed and quoted from the authorities at far greater length than would otherwise be justified. We must, of course, follow the applicable law as it has thus far been established. If there are to be modifications or changes in the law relative to the taxation of such transfers as are here involved, this court is not the proper tribunal to make them.

148 The judgment is reversed and the case remanded for further proceedings not inconsistent with this opinion.

149 In United States Circuit Court of Appeals, Eighth Circuit

No. 10078

ST. LOUIS UNION TRUST COMPANY, A CORPORATION, AND WILLIAM Edwin Guy, Executors of the Estate of William Evans Guy, Deceased, appellants

vs.

LOUIS J. BECKER, COLLECTOR OF INTERNAL REVENUE

Judgment

March 13, 1935

Appeal from the District Court of the United States for the Eastern District of Missouri.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court, in this

cause, be, and the same is hereby, reversed with costs; and that the St. Louis Union Trust Company, a corporation, and William Edwin Guy, executors of the estate of William Evans Guy, deceased, have and recover against Louis J. Becker, collector of internal revenue, the sum of three hundred sixty and 40/100 dollars for their costs in this behalf expended.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions for further proceedings not inconsistent with the opinion of this court filed herein.

150 In United States Circuit Court of Appeals for the Eighth Circuit

[Title omitted.]

Petition for rehearing

Filed April 12, 1935

Comes now the appellee, Louis J. Becker, collector of internal revenue, by his attorneys, and petitions this honorable court for a rehearing in the above-entitled cause, the opinion in which was filed March 13, 1935. In support of this petition the appellee submits:

The opinion of this court deals with the question of transfers intended to take effect in possession or enjoyment at or after
151 death, as though the statute were concerned with transfers of title. It is true that some of the earlier decisions so indicate. But "there has been a steady widening of the concept of a transfer for the purpose of taxation under the provisions of" the Federal estate tax. Burnet v. Guggenheim, 288 U. S. 280, 286.

In its opinion this court referred to Coolidge v. Long, 282 U. S. 582. The majority opinion in that case contained the following (p. 596):

"The fundamental question here is whether rights had so vested prior to the taking effect of the tax statute that there was thereafter no occasion in respect of which the excise might constitutionally be imposed."

In that case the court below had held (p. 595) that "possession or enjoyment upon the death of the survivor of the settlors was a taxable commodity under the statute enacted after the creation of the trust", but the Supreme Court overruled that conclusion, saying (p. 600):

"This court has not sustained any State law imposing an excise upon mere entry into possession and enjoyment of property, where the right to such possession and enjoyment upon the happening of a specified event had fully vested before the enactment."

That the views of the court in this regard have substantially changed clearly appears from a more recent case, which by inad-

vertence was not called to the attention of this court in the brief for the collector.

152 In Guaranty Trust Co. v. Blodgett, 287 U. S. 509, the Supreme Court sustained the decision of a State court taxing transfers to take effect in possession or enjoyment at or after death. The State court had held (p. 512) that the statute "recognized the distinction between taking effect in possession or enjoyment and vesting in right, title, or interest, and intended to reach a shifting of the enjoyment of property although such shifting followed necessarily from a prior transfer of title inter vivos." The Supreme Court accepted that construction and declared (p. 513) that "such a tax does not conflict with any provision of the Federal Constitution."

When this language is compared with Reinecke v. Trust Co. (278 U. S. 339), the widening of the concept of taxable transfers is apparent. In the case cited it was held (p. 347) that "the mere passing of possession or enjoyment of the trust fund from the life tenants to the remaindermen" was not a taxable transfer, although the gift was intended to take effect at or after the donor's death. That this construction was adopted because of the constitutional question in the background is shown by the statement (pp. 348–349) that "Doubts of the constitutionality of a statute, if construed as contended by the Government, would require us to adopt the construction, at least reasonably possible here, which would uphold the act."

153 We submit that the trend of the decisions definitely points to a construction of the statute which would reach such a transfer as is presented in the case at bar. The statute deals with transfers intended to take effect in possession or enjoyment in the same subsection with transfers in contemplation of death. "The quality which brings the transfer within the statute is indicated by the context and manifest purpose." United States v. Wells, 283 U. S. 102, 116. Transfers in contemplation of death are completed inter vivos (both as to title and possession), but are nevertheless subject to an estate tax. Obviously that tax does not reach the transfer of the right. By parity of reasoning the tax upon transfers to take effect in possession or enjoyment at or after death does not depend upon the transfer of the right, but upon the transfer of the possession or enjoyment. That obviously occurs at death whether the remainder be vested or contingent. Accordingly taxability does not turn upon "the various niceties of the art of conveyancing or the law of contingent and vested remainders." Klein v. United States, 283 U. S. 231, 234. So long as the privilege of making a transfer has not been fully exercised, it may be reached by the tax. Chase Nat. Bank v. United States, 278 U. S. 327. Congress intended to reach every substitute for a testamentary disposition. C. Milliken v. United States, 283 U. S. 15, 23. The statute is aimed at the transfer of possession or enjoyment of property—at a shifting of the

154 economic benefits or economic interests therein. Tyler v. United States, 281 U. S. 497. In the case at bar it is perfectly plain

that the death of the grantor was the indispensable and intended event which brought about the transfer of possession and enjoyment, thus satisfying the terms of the taxing act and justifying the tax imposed.

If, as we believe, the tax does not depend upon the technical passage of title, the distinction which this court pointed out between the instant case and the Klein case becomes unimportant and the tax is justified by the adoption of a more practical test—the transfer of the possession and enjoyment. Possession and enjoyment are very real and substantial things. Without them a testamentary transfer is a dry legal abstraction. A construction of the statute which would deny that Congress intended to reach transfers of possession and enjoyment is not in harmony with the concept that taxation is a practical matter and more concerned with the substance than the form. The fact that the Federal estate tax is imposed upon the transfer of, instead of the succession to, property does not distinguish Guaranty Trust Co. v. Blodgett, supra. There was clearly a transfer of possession and enjoyment in this case, the occasion of which was the death of the decedent. If we are right that the prior transfer of title would make no difference, it appears that the requirements of a tax upon a transfer are satisfied.

This court has recognized in its opinion the importance of
155. this question and has disclosed its interest and its willingness to undertake extensive research upon the subject. We hesitate to add to its burdens by this request for a reconsideration, but submit that the transfer of title can no longer be regarded as the test of taxability. The division of the court in Helvering v. Duke, 290 U. S. 591, shows that the principles of law involved were not agreed upon by a majority of the justices sitting, and prevents the case from becoming an authority. Hertz v. Woodman, 218 U. S. 205, 213–214. Such a division could not have occurred if it were settled that the transfer of title inter vivos left no vestige of control over the beneficial enjoyment and possession of the property.

Respectfully submitted.

FRANK J. WIDEMAN,
Assistant Attorney General.
SEWALL KEY,
J. LOUIS MONARCH,
MORTON K. ROTHSCHILD,
Special Assistants to the Attorney General.

APRIL 1935.

CERTIFICATE OF COUNSEL

The undersigned, counsel for appellee, the collector of internal revenue, hereby certifies that in his judgment the foregoing petition is well founded and is not interposed for delay.

FRANK J. WIDEMAN,
Assistant Attorney General.

[File endorsement omitted.]

156 In United States Circuit Court of Appeals

Order denying petition for rehearing

April 19, 1935

The petition for rehearing filed by counsel for appellee having been considered, It is now here ordered by the court that the same be, and it is hereby, denied.

157 [Clerk's certificate to foregoing transcript omitted in printing.]

158 Supreme Court of the United States

Order allowing certiorari

Filed October 14, 1935

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is assigned for argument immediately following No. 213.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

159 (Endorsement on cover:) File No. 39,816. U. S. Circuit Court of Appeals, Eighth Circuit. Term No. 262. Louis J. Becker, Collector of Internal Revenue, petitioner, vs. St. Louis Union Trust Company and William Edwin Guy, Executors of the Estate of William Evans Guy, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed July 19, 1935. Term No. 262 O. T. 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

FILE COPY

No. 262

In the Supreme Court of the United States

October Term, 1965

LOUIS J. BECKER, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

ST. LOUIS UNION TRUST COMPANY, A CORPORATION, AND WILLIAM BOYCE GUY, EXECUTORS OF THE ESTATE OF WILLIAM EVANS GUY, DECEASED

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. —

LOUIS J. BECKER, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

ST. LOUIS UNION TRUST COMPANY, A CORPORATION, and William Edwin Guy, executors of the estate of William Evans Guy, deceased

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of Louis J. Becker, Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above cause on March 13, 1935, reversing the judgment of the District Court.

OPINIONS BELOW

The opinion of the District Court (R. 16) is not officially reported. The opinion of the Circuit Court of Appeals (R. 124) is reported in 76 F. (2d) 851.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 13, 1935. A petition for rehearing was denied on April 19, 1935. (R. 145.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent declared himself trustee of certain personal property for each of his four children in four identical trust instruments. He reserved to himself as trustee the same rights and power in respect to the management of the trust property that he had with respect to property owned absolutely by him. Each trust instrument provided that if the beneficiary should die before the settlor, the trust property should revert to the settlor and become his immediately and absolutely; or if the settlor should die before the beneficiary, then the trust property should become the beneficiary's immediately and absolutely, and in either case the trust should cease. The question presented is:

Whether the property so transferred in trust by the decedent should be included in his gross estate because the transfer (a) was made in contemplation of death or (b) was intended to take effect in possession or enjoyment at or after the settlor's death within the meaning of Section 302 (c) of the Revenue Act of 1926.

STATUTE INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> (a) To the extent of the interest therein of the decedent at the time of his death;
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *
>
> * * * * *
>
> (h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.
>
> * * * * *

(U. S. C. App., Title 26, Sec. 1094.)

STATEMENT

The facts, as found by the District Court (R. 17–20), may be summarized as follows:

In 1921, William Evans Guy, the decedent, who was then 77 years old, executed four separate declarations of trust by the terms of which he conveyed to himself as trustee certain securities for the benefit of each of his four children. (R. 17.) The four declarations of trust were identical in form with the exception of the name of the party for whose benefit the trust was created. (R. 18.) They gave the settlor the same rights and power in respect to the management and control of the trust property as he had with respect to property owned absolutely by him. (R. 18–19.) The settlor, who was also the trustee, could pay the beneficiary as much of the income as he saw fit. Any income not distributed was added to the principal. (R. 19.)

Paragraph 6 of the trust instrument provided as follows (R. 19):

> (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease.

At the time of the execution of the declarations of trust, the decedent was a retired business man but was active in the management of his personal investments; was under the care of a physician, for usual minor ailments, from 1917 until 1928 when he died; was having periodic physical examinations

made by the Life Extension Institute; was normally interested in longevity, and had many times stated that he expected to live to be 90 years of age. At the time of the creation of the trusts, the decedent was a widower, the father of four children, all of whom were then over the age of 21 years, and each of whom was made the sole beneficiary in one of the separate trusts. (R. 17.)

The District Court also found as a fact that the property in the trusts would have reverted to the decedent in the event of the death of the named beneficiary prior to the death of decedent and that none of the beneficiaries named in the trust instruments acquired custody, control or title to the property held in trust until the death of the decedent. The title to the beneficiaries was contingent upon their survival of the decedent, and the motive of decedent in creating the trusts was to decrease his income tax by distributing a portion of his property among the four trusts, thus avoiding the high rate for large incomes, and at the same time to make provision for the distribution of the property to his children at decedent's death. (R. 20.)

The decedent originally transferred bonds of a par value of $72,000 to each of the four trusts, and from time to time made additions to each of the trusts, so that at the time of his death the property held by the four trusts was of the aggregate value of $994,195. The Commissioner of Internal Reve-

nue determined that this amount should be added to the gross estate, which resulted in the additional tax of $94,022.25. The estate paid this amount and upon the rejection of a claim for refund filed suit. The jury was waived and the cause submitted to the court. (R. 17.)

The District Court concluded as a matter of law that the property constituting the corpus of the four trusts was transferred in contemplation of death and that the transfer was intended to take effect in possession or enjoyment at or after his death. Therefore, it was held that the value of the trust property was properly included in his gross estate. (R. 20–21.) The executors of the decedent appealed to the Circuit Court of Appeals, which reversed the decision of the District Court and held that the property transferred in trust should not be included in the decedent's gross estate. The Collector of Internal Revenue filed a petition for rehearing, which was denied on April 19, 1935.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the transfers by trust were not made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926.

2. In holding that the transfers by trust were not intended to take effect in possession or enjoyment at or after the decedent's death within the

meaning of Section 302 (c) of the Revenue Act of 1926.

3. In failing to hold that the value of the property which had been transferred in trust should be included in the gross estate of the decedent under Section 302 (c) of the Revenue Act of 1926.

4. In reversing the decision of the District Court.

REASONS FOR GRANTING THE WRIT

1. The instant case is similar to *Helvering* v. *St. Louis Union Trust Co.* (*Orthwein Estate*), No. 25, October Term, 1935, in which this Court granted certiorari on May 20, 1935, and which is now pending on the merits. In that case the decedent during his lifetime created a trust to pay the income to his daughter during her life, with remainders over after her death. The indenture provided that the trust should terminate if the daughter predeceased the settlor and that the trust estate should be paid over to the settlor, if living. If the grantor were not living, then the income should be paid to the settlor's wife for life, with remainders over. In the instant case, the decedent during his lifetime conveyed to himself as trustee certain securities for the benefit of each of his four children. The decedent could pay the beneficiary as much of the income as he saw fit, and any income not distributed was added to the principal. If the beneficiary should die before the settlor, then the trust estate should revert to the settlor

and become his immediately and absolutely; or if the settlor should die before the beneficiary, then the property should become the beneficiary's immediately and absolutely, and in either event the trust should cease. While the *Orthwein Estate* case arises under the Revenue Act of 1924, there are no material differences between that Act and the Revenue Act of 1926.

2. The instant case is also similar to the case of *Helvering* v. *Duke,* 290 U. S. 591, in which this Court divided equally, resulting in an affirmance of the decision of the lower court. In that case the decedent during his life conveyed certain property to himself as trustee for the benefit of his daughter. The trust instrument gave the decedent broad powers as trustee to invest and reinvest. It also provided that if his daughter should die in the lifetime of the settlor the trust should cease and all the trust property should revert to the settlor absolutely. The *Duke* case is not an authority on account of the equal division of this Court. *Hertz* v. *Woodman,* 218 U. S. 205, 213–214. This case affords an opportunity to clear up the existing uncertainty due to the *Duke* case.

3. The decision of the court below to the effect that the transfers in trust by the decedent were not made in contemplation of death is erroneous. The court said that this was essentially a question of fact, and reversed the decision of the District Court on the ground that there was no evidence to support the finding that the transfers were made in con-

templation of death. The court below stated that according to the evidence the decedent was actuated by two motives: (1) to make his children independent, and (2) to avoid high surtaxes upon his income, and that both of these motives were intimately associated with life. But these motives relate only to the creation of the life estate. They do not explain the distribution of the corpus of the trust estate at the death of the decedent. While there is no direct evidence in the record as to the reason for that provision in the trust instrument, the instrument speaks for itself. Moreover, that provision relating to the distribution of the corpus at the death of the decedent supports the finding of fact by the District Court that one of the motives of the decedent in creating the trusts was to make provision for the distribution of the property to his children at his death.

If this Court grants the petition for a writ of certiorari in the instant case, we expect to urge this specification of error in the alternative as ground for the reversal of the judgment of the Circuit Court of Appeals.

In view of the fact that this Court granted the petition for a writ of certiorari in *Helvering* v. *St. Louis Union Trust Co.* (*Orthwein Estate*), we respectfully submit that the petition in this case should be granted.

STANLEY REED,
Solicitor General.

JULY 1935.

U. S. GOVERNMENT PRINTING OFFICE: 1935

FILED
OCT 23 1935
CHARLES ELMORE CROPLEY
CLERK

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No. 262

In the Supreme Court of the United States

OCTOBER TERM, 1935

LOUIS J. BECKER, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

ST. LOUIS UNION TRUST COMPANY, A CORPORATION,
AND WILLIAM EDWIN GUY, EXECUTORS OF THE
ESTATE OF WILLIAM EVANS GUY, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 262

LOUIS J. BECKER, COLLECTOR OF INTERNAL REVENUE, petitioner

v.

ST. LOUIS UNION TRUST COMPANY, A CORPORATION, and William Edwin Guy, Executors of the Estate of William Evans Guy, Deceased

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

There was no opinion by the District Court. The opinion of the Circuit Court of Appeals (R. 41) is reported in 76 F. (2d) 851.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on March 13, 1935. (R. 58.) A petition for rehearing was filed April 12, 1935 (R. 59), and denied on April 19, 1935 (R. 62). The petition for a writ of certiorari was filed July 19, 1935, and granted October 14, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The decedent declared himself trustee of certain personal property for each of his four children in four identical trust instruments. He reserved to himself as trustee the same rights and power in respect to the management of the trust property that he had with respect to property owned absolutely by him. Each trust instrument provided that if the beneficiary should die before the settlor, the trust property should revert to the settlor and become his immediately and absolutely; or if the settlor should die before the beneficiary, then the trust property should become the beneficiary's immediately and absolutely, and in either case the trust should cease. The question presented is:

Whether the property so transferred in trust by the decedent should be included in his gross estate because the transfer (a) was intended to take effect in possession or enjoyment at or after the settlor's death or (b) was made in contemplation of death,

within the meaning of Section 302 (c) of the Revenue Act of 1926.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved will be found in the Appendix, *infra*, pp. 25, 26.

STATEMENT

The facts, as found by the District Court (R. 13–16), may be summarized as follows:

In 1921, William Evans Guy, the decedent, who was then 77 years old, executed four separate declarations of trust by the terms of which he conveyed to himself as trustee certain securities for the benefit of each of his four children. (R. 13.) The four declarations of trust were identical in form with the exception of the name of the party for whose benefit the trust was created. (R. 14.) They gave the settlor the same rights and power in respect to the management and control of the trust property as he had with respect to property owned absolutely by him. (R. 14–15.) The settlor, who was also the trustee, could pay the beneficiary as much of the income as he saw fit. Any income not distributed was added to the principal. (R. 15.)

The declaration of trust for Evelyn S. Guy is typical of each of the trusts, and, so far as pertinent, is as follows (R. 14–15):

> I, William Evans Guy, of the City of St. Louis, and State of Missouri, hereby declare, this third day of January, 1921, that

I hold in trust for my daughter, Evelyn S. Guy, the following property, to wit:

[Here follows description of securities]; with the powers and for the uses and purposes hereinafter set forth as follows:

1. I am to have the power at any time, and from time to time, to sell, any of the trust property or estate, for such price and prices as I may determine; any money coming into my hands as the proceeds of any such sale or otherwise and forming a part of the principal of said trust estate shall as soon as practicable, be reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted to the purchase of such property as is ordinarily deemed advisable for trust property. I am likewise to have the power to rent or lease any and all real estate which may be included in said trust property for terms of any duration, whether such terms shall extend to a time beyond the termination of this trust or not. I am likewise to have full power and authority in my discretion to borrow money and secure the sums so borrowed by pledge or mortgage of any and all portions of said trust estate and I may out of the corpus or income of said trust estate, or out of both such corpus and income repay the sums so borrowed, I am to have full authority to invest or reinvest any sums so borrowed; and to collect and receive the rents, income

and profits arising from the trust estate therein created. It being my intention to retain *as trustee* [italics ours] such rights, power, and authority in respect to the management, control, and disposition of said trust estate for the use and benefit of the beneficiary, as I have with respect to property absolutely owned by me.

2. Out of the income and revenue accruing from said trust estate I shall have power to pay all taxes, expenses necessarily or properly incident to its care, preservation and management; and all other reasonable or necessary charges incident to the administration of the trust created hereby, and out of the remaining income and revenue, I am to pay the beneficiary of this trust an allowance of $300 a month, with power in my discretion from time to time to increase or decrease the said allowance whenever I may deem it to be to the best interest of the said beneficiary, to have such allowance increased or decreased, I shall have the power, from time to time, out of the remainder of said income and revenue, to appropriate and pay such sums as I may deem reasonably necessary for the maintenance, support, and education of said beneficiary. Any income not distributed as hereinabove provided shall be added to the principal of the trust estate.

3. In case of an emergency, or illness of said beneficiary, requiring a greater sum than that accruing as income or revenue, I shall have power to use as much of the prin-

cipal of said trust estate as may be absolutely necessary.

4. Any receipt given by the beneficiary of this trust to me for any sum paid to her by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

5. The foregoing provision for my said daughter, Evelyn S. Guy, shall be for her sole and separate use, free from all statutory and marital rights of her husband; and free from her debts and without the right on her part to assign, pledge, hypothecate, or anticipate, or in any way create a lien upon any of the income or corpus of the trust estate hereby created before she shall receive the same, nor shall any of the said income or corpus be subject to any claims of any persons who may be at any time creditors of my said daughter.

6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease.

At the time of the execution of the declarations of trust, the decedent was a retired business man but was active in the management of his personal investments; was under the care of a physician, for usual minor ailments, from 1917 until 1928 when

he died; was having periodic physical examinations made by the Life Extension Institute; was normally interested in longevity, and had many times stated that he expected to live to be 90 years of age. At the time of the creation of the trusts, the decedent was a widower, the father of four children, all of whom were then over the age of 21 years, and each of whom was made the sole beneficiary in one of the separate trusts. (R. 13–14.)

The decedent originally transferred bonds of a par value of $72,000 to each of the four trusts, and from time to time made additions to each of the trusts, so that at the time of his death the property held by the four trusts was of the aggregate value of $994,195. The Commissioner of Internal Revenue determined that this amount should be added to the gross estate, which resulted in the additional tax of $94,022.25. The estate paid this amount and upon the rejection of a claim for refund filed suit. The jury was waived and the cause submitted to the court. (R. 13–14.)

The District Court found as a fact that the property in the trusts would have reverted to the decedent in the event of the death of the named beneficiary prior to the death of decedent and that none of the beneficiaries named in the trust instruments acquired custody, control or title to the property held in trust until the death of the decedent; that the title to the beneficiaries was contingent

upon their survival of the decedent; and that the motive of decedent in creating the trusts was to decrease his income tax by distributing a portion of his property among the four trusts, thus to avoid the high rate for large incomes, and at the same time to make provision for the distribution of the property to his children at decedent's death. (R. 16.)

The District Court concluded as a matter of law that the property constituting the corpus of the four trusts was transferred in contemplation of death and that the transfer was intended to take effect in possession or enjoyment at or after his death. Therefore, it was held that the value of the trust property was properly included in his gross estate. (R. 16.)

The Circuit Court of Appeals reversed the decision of the District Court and held both that the transfers were not intended to take effect in possession or enjoyment at decedent's death, and that there was no evidence to sustain the Commissioner's determination and the trial court's finding and conclusion that the transfers were made in contemplation of death. (R. 41–58.) Specifically, it held the decedent was actuated by two motives: (1) to make his children independent; (2) to avoid high surtaxes upon his income. Also, that evidence was lacking that decedent was influenced by the thought of death. (R. 58.)

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding that the transfers by trust were not made in contemplation of death within the meaning of Section 302 (c) of the Revenue Act of 1926.

2. In holding that the transfers by trust were not intended to take effect in possession or enjoyment at or after the decedent's death within the meaning of Section 302 (c) of the Revenue Act of 1926.

3. In failing to hold that the value of the property which had been transferred in trust should be included in the gross estate of the decedent under Section 302 (c) of the Revenue Act of 1926.

4. In reversing the decision of the District Court.

SUMMARY OF ARGUMENT

1. The instruments in question, each denominated "declaration of trust," are intended, (1) to provide a definite source of income for the decedent's children during the period of his life, such trusts terminating, in any event, at his death, and (2) to provide for the devolution of the property upon the termination of trusts at his death. The provision for such devolution is a substitute for a testamentary disposition. It is no longer open to doubt that such substitutes are within the purview of the statute. His death, and not the transfer to him as trustee, was the generating source of title to the corpus of the property theretofore transferred. Furthermore, his death resulted in a shift-

ing, or in the completion of a shifting, to the donee of the economic benefits of the property. Therefore, the property is subject to the death tax.

2. The transfers were made in contemplation of death. The Commissioner so determined and the District Court sustained the determination. The burden of proof is upon the taxpayer to overcome the presumption of the correctness of the Commissioner's determination. This they can do only by showing that the decedent was actuated by a life motive in making them. The life motives of the decedent to provide a definite source of income for his children and to reduce surtaxes during his life have reference to the creation of the trust estates only in so far as they subserve such purposes. Any motive to accomplish such purposes after his death, by a disposition made to take effect only upon the termination of the trusts at death, would obviously be one connected with death and is such a motive as ordinarily impels persons to make formal testamentary dispositions. The trial court found that one of the decedent's motives was "to make provisions for the distribution of the property to his children at decedent's death," and concluded that the transfers were therefore made in contemplation of death. These are reasonable inferences and conclusions from the record.

ARGUMENT

I

THE DEATH OF THE DECENDENT WAS THE GENERATING SOURCE OF TITLE TO THE CORPUS OF THE TRUST ESTATE TRANSFERRED TO THE BENEFICIARIES

There are presented in the instant case two questions: whether under the provisions of Section 302 (c), Revenue Act of 1926, a transfer of property, under the form of instrument involved here, (a) was intended to take effect in possession or enjoyment at or after the death of the settlor, or (b) was made in contemplation of death.

The first question is essentially the same as that presented in *Helvering* v. *St. Louis Union Trust Co.* (Estate of William J. Orthwein), No. 25, October Term, 1935, hereinafter referred to as the *Orthwein* case, and involving the proper construction and application of the corresponding provision of the Revenue Act of 1924. So far as now material, the provisions of the Revenue Acts are the same. The attention of the Court, therefore, is respectfully invited to the discussion and argument on behalf of the Commissioner of Internal Revenue in the *Orthwein* case, which is expressly adopted and incorporated herein by reference as being in all essential respects applicable and controlling upon the present facts.

The determination of the Commissioner of Internal Revenue in the instant case, as well as in the

Orthwein case, is based upon the significant fact that *not until the death of the settlor prior to that of the beneficiary did there arise in the beneficiary the absolute and unconditional right to the corpus of the property theretofore transferred.* Prior to his own death, there remained in the decedent a substantial interest in the corpus of the transferred property, represented by his right to retake such corpus upon the death of the beneficiary. Upon the settlor's death the possibility of his recovering the corpus was removed and the right of the beneficiary thereto became absolute and complete. It is this salient and vital fact which distinguishes the instant case (and the *Orthwein* case) from all of the cases relied upon by the court below, with the exception of *McCormick* v. *Burnet*, 283 U. S. 784, and *Helvering* v. *Duke*, 290 U. S. 591. As pointed out in the Government's brief in the *Orthwein* case, the facts and the circumstances surrounding the decisions in the *McCormick* and *Duke* cases do not require a like result here.

By the declarations of trust, the decedent merely transferred certain securities to himself as trustee for the period of his life, in trust for his children. By the terms of the instruments these trusts were terminable at the settlor's death, though any one of the trusts might be sooner terminated if the beneficiary thereof predeceased him. The only provision with respect to the transfer of the *corpus* of the estate to the beneficiaries is contained in the last paragraph of the instrument, and is to the

effect that in the event a beneficiary survived the settlor, the property should be delivered to such beneficiary.

It is thus apparent that the trusts created merely a life estate in the corpus for the purpose of providing income for the settlor's children during his lifetime. His avowed motive for creating them bears out this conclusion, for he told his son that he "wanted to get rid of the nuisance" of treating his children as such, and having to make them allowances; that he wanted them to be independent, so that they would know what they were going to get each year; that he also wanted to avoid high surtaxes, and felt that it was justifiable to distribute the income, making each of the children the owner of an independent income, and requiring them to pay the tax thereon. Clearly, therefore, the beneficiaries took merely estates for the life of the grantor. Only upon decedent's death, prior to that of the beneficiary, did there arise in the latter an absolute and indefeasible right to take the corpus of the transferred property. It follows that the decedent's death, and not the transfer of the securities to him as trustee, was the generating source of his children's title to the corpus of the property.

The facts in the case at bar are especially similar to those before this Court in *Klein* v. *United States*, 283 U. S. 231. We submit they bring the instant case squarely within the principle of the *Klein* case. There the decedent had by deed conveyed certain property to his wife for her life, a reversion being

reserved to him in the fee; the conveyance being upon the further condition that the grantee thereunder by virtue of the conveyance take the fee simple only in the event that she survived the grantor. This Court held that the grant was contingent, only a life estate being thereby vested in the wife, with an express reservation of the fee by the grantor which remained vested in him in the event the grantee should die before him, the grantee taking the fee only in the event that she should survive him. It will be noted that, though the conveyance was made to the wife, the express reservation of the fee limited the grant to a life estate, with the result that, as the Court pointed out (p. 234):

> * * * the death of the grantor was the indispensable and intended event which brought the larger estate into being for the grantee and effected its transmission from the dead to the living, thus satisfying the terms of the taxing act and justifying the tax imposed.

The statute referred to was that portion of Section 402 (c) of the Revenue Act of 1918, which, similarly to Section 302 (c) of the Revenue Act of 1926, here applicable, required the inclusion in the gross estate for estate-tax purposes of property in respect of which the decedent had made a transfer or created a trust to take effect in possession or enjoyment at or after death.

The only difference between the two cases is that in the *Klein* case there was an express reservation

of the fee by the grantor individually, whereas in the case at bar the fee was held by the grantor as trustee. That is merely the difference between a transfer by deed and a transfer in trust. We submit that difference cannot affect the result for the statute, in terms, applies to both alike. Here, as in the *Klein* case, the condition of the beneficiaries receiving title to the corpus of the estate depended solely upon their surviving the decedent. In the *Klein* case the provision was that (p. 233):

> Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have, and hold the said lands in fee simple,

In the case at bar, the provision is that (R. 15):

> * * * if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her * * * .

Like the grantee in the *Klein* case, the beneficiaries here took only a life interest in the income of the transferred property. Their interest in the corpus was contingent, and "whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen *before* that of the grantee" (p. 233).

Moreover, this Court has laid down the rule in cases involving similar transfers of property intended to take effect in possession or enjoyment

at or after the grantor's death, that where, as here, the death of the decedent results in a shifting, or in the completion of the shifting to the donee of the economic benefits of property, such property is subject to the death tax. *Chase Nat. Bank* v. *United States,* 278 U. S. 327, 338; *Reinecke* v. *Northern Trust Co.,* 278 U. S. 339, 346; *Saltonstall* v. *Saltonstall,* 276 U. S. 260, 270–271; *Heiner* v. *Donnan,* 285 U. S. 312, 322–323. As was pointed out by this Court in *Tyler* v. *United States,* 281 U. S. 497, 503, the question is—

> * * * whether the death has brought into being or ripened for the survivor, property rights of such character as to make appropriate the imposition of a tax upon that result (which Congress may call a transfer tax, a death duty, or anything else it sees fit), to be measured, in whole or in part, by the value of such rights.

Clearly, in the instant case, the removal of the condition precedent (death of the settlor) was the occasion which ripened, or brought into being, the right of the beneficiaries to receive the corpus.

None of the decisions of this Court, cited by the court below as authoritative, are believed to be controlling in the case at bar, since in none of them (with the exception of the *McCormick* and *Duke* cases) did the grantor reserve the right to retake the corpus upon the death of the beneficiary prior to his own.

For the reasons stated in the Government's brief in the *Orthwein* case, *supra,* it is submitted the *McCormick* case does not require a result in the instant case similar to the one reached there.

While the facts in the case at bar are essentially the same as presented in the *Duke* case, *supra,* the result there is not authoritative upon the question involved herein and has no binding effect as a precedent. *Hertz* v. *Woodman,* 218 U. S. 205. Furthermore, this Court would scarcely have so divided in the *Duke* case if the *McCormick* decision had settled the question.

Since neither the *McCormick* nor the *Duke* case can be considered as having decided the issue herein, and since no other decision of this Court, with the exception of the *Klein* case, deals with an interest retained in the corpus of transferred property, the adoption of the suggested construction of the statute will not require the reversal or modification of any prior decision.

II

THE TRANSFERS IN QUESTION WERE MADE IN CONTEMPLATION OF DEATH AND WERE SUBSTITUTES FOR A TESTAMENTARY DISPOSITION

In the instant case, the Commissioner determined, among other things, that the transfers were made in contemplation of death. The District Court found as a fact that decedent's motive in creating the trusts was to decrease his tax on the *income* of the transferred property and, at the

same time, to make provision for the distribution of the property (*corpus*) to his children at his death. The District Court concluded, as a matter of law, "that the property constituting the corpus of the four trusts was property of which the decedent made a transfer in contemplation of death."

There is no question here of the application of either the rebuttable or conclusive two-year presumption provided by the pertinent provision of the Revenue Act of 1926, since the transfers here were made seven years prior to decedent's death. Nevertheless, the determination of the Commissioner carries a presumption of correctness and, unquestionably, the burden of proof is on the taxpayer to show that the Commissioner's determination is invalid. *Milliken* v. *United States*, 283 U. S. 15, 19; *Helvering* v. *Taylor*, 293 U. S. 507.

The court below based its reversal of the District Court's finding, that the transfers were made in contemplation of death, upon the evidence that the decedent, in making these trusts, was actuated by two motives: (1) to make his children independent; (2) to avoid high surtaxes upon his income. The court further declared evidence was lacking that decedent was in any way influenced by the thought of death.

It is submitted the grounds stated fall far short of sustaining the Circuit Court's decision. In the first place, the indicated motives to reduce surtaxes and to provide an adequate income for his children during his life could only have inspired, and could

obviously have reference only to, the creation of the trust estates insofar as they subserved such purposes. This was wholly accomplished by paying the beneficiaries the income for the period of the settlor's life. The tax here is upon the transfer of the corpus that was withheld from the beneficiaries until the decedent's death. Accordingly, so far as the corpus is concerned, the decedent had no motive associated with his own life. On the contrary, it was associated with his death, and this is properly treated as a testamentary disposition. Furthermore, although the Court declared evidence was lacking that decedent was actuated by any thought of death, such motive clearly appears from the actual disposition of the corpus to take effect at, and not before, decedent's death.

The Circuit Court of Appeals evidently meant that decedent was not thinking of the imminence of death. It appears clear, however, that he was contemplating the consequences of his death and accordingly made provision for his children to succeed to his property upon that event. The evidence showed a purpose associated with death; and there was shown no positive motive of the grantor, with respect to the transfers of the corpus of the property, sufficient to overcome the presumption of correctness attaching to the Commissioner's determination that they were made in contemplation of death.

In these circumstances, we submit that the findings of the trial court are supported both by the

evidence of the actual transfers to take effect at death and by the presumption of correctness which attaches to the Commissioner's determination. Thus, the transfers are brought squarely within the well established principle that transfers of this kind are made in contemplation of death, within the meaning of the statute, where the dominant motive therefor is shown to be one associated with death. *Nichols* v. *Coolidge,* 274 U. S. 531, 542; *Milliken* v. *United States, supra,* at p. 23; *United States* v. *Wells,* 283 U. S. 102, 116–117; and *Heiner* v. *Donnan, supra.*

In *Milliken* v. *United States, supra,* this Court had for consideration the correctness of the Commissioner's determination that a gift of stock, wholly completed, and transferred by the decedent to his children in 1916 (four years prior to his death) was a transfer in contemplation of death under the like provision of the Revenue Act of 1918. The finding of the Commissioner was held to be controlling in the circumstances, since it was not overcome by any evidence to the contrary. With respect to the aim of the statute, this Court declared (p. 23):

> It is sufficient for present purposes, that such gifts are motivated by the same considerations as lead to testamentary dispositions of property, and made as substitutes for such dispositions without awaiting death, when transfers by will or inheritance become effective. Underlying the present statute is the policy of taxing such gifts equally with

> testamentary dispositions, for which they may be substituted, and the prevention of the evasion of estate taxes by gifts made before, but in contemplation of, death. It is thus an enactment in aid of, and an integral part of, the legislative scheme of taxation of transfers at death.

Here, the transfers of the *corpus* were not completed until the death of the decedent and the facts are insufficient to show that, as to the corpus, the grantor was actuated by any motive other than contemplation of death.

The District Court found two motives, one associated with life (to avoid payment of surtaxes and make his children independent), and the other associated with death (to provide for distribution of property upon death) (R. 16). As pointed out above, the Circuit Court of Appeals is in error in holding that the evidence did not sustain the second motive.

Accordingly, the question is which motive predominated? (Cf. *Milliken* case, *supra.*) This question is answered by the Commissioner's determination; no evidence overcame it, and the District Court did not disturb it. The Circuit Court of Appeals could not weigh the evidence and decide otherwise.

Therefore, we submit that there is no basis upon which the District Court's decision could be reversed.

It is submitted the decision of the court below conflicts in principle with the decision of the Second Circuit Court of Appeals in *Farmers' Loan & Trust Co.* v. *Bowers* (Astor case), 68 F. (2d) 916, certiorari denied, 293 U. S. 565. While in the so-called "Astor case" the decedent died within a two-year period subsequent to making the transfers of trust, and the burden was on the taxpayer to overcome the presumption of the statute that the transfers were made in contemplation of death, it appeared that two motives actuated the decedent in transferring the property involved therein. These motives were, first, to avoid the payment of taxes (income and capital levy) during his own lifetime; and, second, the payment of estate taxes at his death. As in the present case, the transfers of the corpus were intended to take effect at the time of his death. The Circuit Court of Appeals held that the transfers were within the intendment of the statute, as construed by this Court in the *Nichols, Milliken, Wells,* and *Donnan* cases *supra.* In reaching its conclusion, the Second Circuit Court of Appeals pointed out (pp. 923–924):

> There were two or more motives for transfer established, each of which substantially induced the making of the gift, and since it is impossible to determine any one single dominating, controlling, or impelling motive, the taxpayer has failed in sustaining the burden of proof. Where the donor

makes a gift to accomplish some purpose to be effective during his lifetime and at the same time to accomplish a purpose to be effective at his death, each one of which substantially induces the transfer and is part of the inducing element going into making the gift, each of the motives becomes an inducing, actuating, and determining cause. Therefore each is controlling and each is compelling. In such case section 402 (c) is applicable, for the intent or motive to evade the tax is present.

* * * * *

* * * The same specific motives of generosity or a desire to see children independent may be present, but in addition there is present a definite and positive state of mind contemplating death. It is that state of mind which is inseparable from acts of testamentary disposition. That contemplation to some extent constitutes a specific motive of the transfer. Other specific motives, such as a testamentary scheme to save the estate tax may be present and, unlike the usual motives of generosity or protection of dependents, point strongly to the presence of the motive of contemplation of death not completely expressed.

* * * Where the motive associated with the contemplation of death appears equally or substantially with the motives associated with contemplated continued life, nothing that was said in the Wells Case offers a rule for choice of a dominant motive. It is in

just such a case as this, if death follows the material transfer within two years, that the presumption set up by the statute properly operates and the taxpayer must prove that the gift was not made in contemplation of death.

Since, in the instant case two motives were found to have impelled the transfers, and it has not been shown that the life motive predominated, the fact that these transfers of the corpus were made to take effect at death (in fact, were substitutes for testamentary dispositions) brings the transfers within the intendment of the statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed.

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OCTOBER 1935.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. * * *

* * * * *

(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of

powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this Act.

* * * * *

(U. S. C. App., Title 26, Sec. 1094.)

Treasury Regulations 70, promulgated under the Revenue Act of 1926 (1929 ed.):

ART. 17. *General.*—All transfers made by the decedent subsequent to September 8, 1916, other than bona fide sales for an adequate and full consideration in money or money's worth, which were intended to take effect in possession or enjoyment at or after his death, are taxable, and the value, as of the date of the decedent's death, of property or interest so transferred must be returned as a part of the gross estate.

ART. 18.

* * * * *

Where there was no reservation of income or an annuity but it was intended that possession or enjoyment of the transferred property, or a portion thereof, should be postponed until at or after decedent's death, then the value of the entire property or of such portion, as the case may be, should be included in the gross estate. Thus a gift of the principal intended to take effect either in possession or enjoyment at or after the decedent's death is taxable, although the income or annuity was payable during the decedent's life to someone other than himself. Example: The decedent transferred property to his son, the latter to receive the income during the decedent's life or agreeing to pay the income to his mother during the decedent's life. The transfer to the son in either case is taxable.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

LOUIS J. BECKER, Collector of Internal Revenue,
Petitioner,

v.

ST. LOUIS UNION TRUST COMPANY, a Corporation, and WILLIAM EDWIN GUY, Excutors of the Estate of WILLIAM EVANS GUY, Deceased,
Respondents.

BRIEF IN OPPOSITION TO PETITION OF GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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OF GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

PRELIMINARY STATEMENT.

This brief is respectfully submitted on behalf of the respondents in opposition to the pending "Writ of Certiorari" filed for Louis J. Becker, Collector of Internal Revenue, by the Solicitor General.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered on March 13, 1935. A petition for rehearing was denied on April 19, 1935 (R. 145). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

STATUTE INVOLVED.

Revenue Act of 1926, c. 27, 44 Stat. 9:

> "Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> "(a) To the extent of the interest therein of the decedent at the time of his death;
>
> • • • • • • •
>
> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. • • •
>
> • • • • • • •
>
> "(h) Except as otherwise specifically provided therein subdivisions (b), (c), (d), (e), (f), and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this act.
>
> • • • • • • •
>
> (U. S. C. App., Title 26, Sec. 1094.)"

STATEMENT.

The facts stated in the petition with reference to the question of whether or not the trusts involved were intended to take effect at or after death are sufficient, except that a fair statement should include the fact that the granting clause of each of the trust instruments involved provided "I, William Evans Guy, • • • hereby declare • • • that I hold in trust for my daughter (or son, naming him or her) the following property" (R. 31). With respect to the facts in connection with the question of whether or not the trusts here involved were created in contemplation of death, we respectfully refer the Court to the opinion of the Circuit Court of Appeals (R. 124 et seq.), in which the facts are fully and fairly stated.

QUESTION PRESENTED.

The question presented is whether a mere possibility of reverter remaining in a grantor after the granting of an equitable fee in trust property to a named beneficiary, subject, however, to defeasance by the death of the beneficiary prior to that of the grantor, is a sufficient interest in the trust property to justify inclusion of the entire value thereof in the grantor's estate for estate tax purposes.

SUMMARY OF ARGUMENT.

I.

There is no similarity between the instant case and the case of Helvering, Commissioner, v. St. Louis Union Trust Company, 75 Fed. (2) 416 (C. C. A. 8). Certiorari was granted in that case because of the conflict between the decision therein and the decision of the Circuit Court of Appeals for the Second Circuit in Commissioner v. Schwarz, 74 Fed. (2) 712. In the Orthwein case and the Schwarz case life estates were granted with remainders over in the respective grantors. In the instant case a defeasible equitable fee was given each beneficiary with a mere possibility of reverter in the grantor. No conflict exists between the decision in the instant case and the decision in the Schwarz case, so that the ground upon which certiorari was granted in the Orthwein case is absent here.

Helvering v. St. Louis Union Trust Company, 75 Fed. (2d) 416 (C. C. A. 8), certiorari granted May 20, 1935, No. 25, Oct. Term, 1935;

Commissioner v. Schwarz, 74 Fed. (2d) 712 (C. C. A. 2);

Klein v. United States, 283 U. S. 231;

Rollestone v. National Bank of Commerce, 299 Mo. 57, l. c. 70, 252 S. W. 394;

Korompolis v. Tompras, 251 S. W. 80 (St. Louis Court of Appeals);

Northrip v. Burge, 255 Mo. 641, 164 S. W. 584;

Deacon v. St. Louis Union Trust Company, 271 Mo. 669, l. c. 678, 679, 689, 690, 691, 197 S. W. 261;

Pollard v. Union National Bank, 4 Mo. App. 408;

Patrick v. Blair, 119 Mo. 105, 24 S. W. 767;

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Helvering v. Duke, 290 U. S. 591;
McCormick v. Burnet, 283 U. S. 784;
Commissioner v. Bonney, 75 Fed. (2d) 1008 (C. C. A. 2);
Commissioner v. Dunham, 73 Fed. (2d) 752 (C. C. A. 7).

II.

There is no uncertainty existing by reason of the decision of this Court in the case of Helvering v. Duke, 293 U. S. 591, when applied to the facts in the instant case. The instant case is controlled by the decisions of this Court in McCormick v. Burnet, 283 U. S. 784, and Commissioner v. Wallace, 293 U. S. 600.

III.

The fact that distribution of the trust property was to be made upon the death of the grantor afforded no evidence that the trusts were created in contemplation of death, and the Circuit Court of Appeals was correct in so holding in this case. A contrary holding would have contravened the following decisions of this Court.

Reinecke v. Northern Trust Company, 278 U. S. 389;
May v. Heiner, 281 U. S. 238;
McCaughn v. Carnill, 43 Fed. (2) 69 (C. C. A. 3), certiorari denied 283 U. S. 825;
Hodgkins v. Commissioner, 44 Fed. (2) 43 (C. C. A. 7), certiorari denied 283 U. S. 825;
Burnet v. Northern Trust Company, 283 U. S. 782;
Morsman v. Burnet, 283 U. S. 783;
McCormick v. Burnet, 283 U. S. 784.

ARGUMENT.

The reasons assigned in the petition for granting the writ are as follows:

First. That the instant case is similar to Helvering v. St. Louis Union Trust Company (Orthwein Estate), No. 25, October Term, 1935, in which this Court granted certiorari on May 20, 1935.

Second. That the instant case is similar to the case of Helvering v. Duke, 290 U. S. 591, concerning which there is an existing uncertainty which needs to be cleared up; and

Third. That the position of the court below that the transfers by decedent were not made in contemplation of death is erroneous—the last reason being assigned as one to be urged in the alternative in the event the petition for writ of certirorari is granted.

As to the first ground, we respectfully submit that there is no similarity between the instant case and the Orthwein case, and that the reasons assigned for granting certiorari in the Orthwein case could not be and have not been assigned as reasons for granting certiorari in this case. The principal reason assigned for granting certiorari in the Orthwein case was that a conflict of decision existed between the decision of the Circuit Court of Appeals for the Eighth Circuit in the Orthwein case, 75 Fed. (2) 416 (C. C. A. 8), and the decision of the Circuit Court of Appeals for the Second Circuit in the case of Commissioner v. Schwarz, 74 Fed. (2) 714 (C. C. A. 2). In the Orthwein case and in the Schwarz case a life estate was granted to a named beneficiary, with provision that upon the termination of the life estate the property should be

turned over to the grantor, if then living, and, if not then living, to the grantor's descendants, in the Schwarz case, and to other named beneficiaries, in the Orthwein case. In both cases only a life estate was granted presently with remainder in the grantor upon the termination of the life estate. See Commissioner v. Schwarz, supra, l. c. 714.

With respect to the fact that only a life estate was presently granted, both the Schwarz case and the Orthwein case are similar to the case of Klein v. United States, 283 U. S. 231, 51 Sup. Ct. 398, 75 L. Ed. 996. The critical fact in both the Schwarz case and the Orthwein case is the granting of the life estate in the beneficiaries. In this respect the two cases are utterly dissimilar to the instant case. Here no life estate of any sort is granted. By the granting of these trusts, Mr. Guy declared that "I hold in trust for my daughter (or son, naming him or her) the following property," etc. This clause, standing alone, would have vested a complete equitable fee in the respective beneficiaries.

Rollestone v. National Bank of Commerce, 299 Mo. 57, l. c. 70, 252 S. W. 394;
Korompolis v. Tompras, 251 S. W. 80 (St. Louis Court of Appeals);
Northrip v. Burge, 255 Mo. 641, 164 S. W. 584.

By the last clause of each instrument it was provided that in the event the beneficiary should predecease him the trust property was to revert to Mr. Guy. This provision did not prevent the granting clause from operating, but had the effect of attaching to the operation thereof a condition subsequent upon the happening of which the estate which had already passed to the trustee and the benficiary by virtue of the granting clause should determine and revert to Mr. Guy. The complete and absolute equitable

fee previously granted was converted into a determinable or defeasible fee.

> Deacon v. St. Louis Union Trust Company, 271 Mo. 669, l. c. 678, 679, 689, 691, 197 S. W. 261.

In that case the will left property to trustees to be held for the benefit of named children for thirty years and then distributed to them with a provision that in the case of the death prior to distribution of any of them without issue his or her share should go to the survivors of the children, or their issue.

On page 691 the Supreme Court of Missouri said:

> "The effect of clause 8, therefore, is to modify the absolute estate vested in each child by the prior provisions of the will, into a present interest, but one subject to be divested by a condition subsequent, namely, death before the end of the trust period leaving or not leaving issue as the case may be, **thus creating a defeasible instead of an absolute fee.**" (Emphasis ours.)

To the same effect are:

> Pollard v. Union National Bank, 4 Mo. App. 408;
> Patrick v. Blair, 119 Mo. 105, 24 S. W. 767;
> Edson v. Lucas, 40 Fed. (2) 398 (C. C. A. 8).

In the Schwarz case and the Orthwein case a life estate was granted with a remainder in the grantor. In the present case a defeasible fee was granted to each beneficiary with a bare possibility of reverter in the grantor. See Deacon v. St. Louis Union Trust Co., supra, l. c. 690, where the Court said: "The interest of the parents as we have seen is that of a defeasible fee. **After a fee nothing remains.**" (Emphasis ours.) It is submitted that there is

no similarity between the instant case and the two cited cases.

An additional distinction lies in the fact that in the Schwarz case and in the Orthwein case only the remainder interest of the grantor was sought to be taxed, and this fact was urged in the petition for certiorari as distinguishing the Orthwein case from the case of Commissioner v. Wallace, 71 Fed. (2) 1002 (C. C. A. 2), certiorari denied 293 U. S. 600.

In this case, as in the Wallace case, the entire value of the trust property is sought to be subjected to tax.

With respect to the second reason assigned—namely, the similarity between the trusts here involved and the trusts involved in Helvering v. Duke, 290 U. S. 591—there is substantial similarity between the trusts here involved and the trust created for Doris Duke to be distributed to her upon her arrival at certain ages. However, no uncertainty exists by reason of the decision of this Court in the Duke case when applied to the facts in the instant case. The situation here is identical in principle to that involved in McCormick v. Burnet, 283 U. S. 784, which was decided by a unanimous court.

The case of Commissioner v. Wallace, 293 U. S. 600, disposed of any doubts which might have existed by reason of the decision in the Duke case, when applied to a situation where not merely a life estate, but the entire interest of the grantor is presently conveyed either by way of a fee or a life estate with a vested remainder over, notwithstanding the fact that the estate thus granted may be defeated upon the happening of a condition subsequent. As stated in the petition for certiorari in the Orthwein case, all the considerations advanced under reason 2 in the instant case were present both in the Orthwein case and in the Wallace case. The petition was denied in the Wallace case and was

granted in the Orthwein case. In the Orthwein case there was the additional factor of a conflict between the Orthwein case and the Schwarz case. We must assume that the writ was granted because of this conflict. No such conflict exists in the instant case, and we respectfully submit that the writ should be denied.

To grant the writ in this case would permit the Government to discriminate among taxpayers for the reason that it has failed to apply for certiorari in the cases of Commissioner of Internal Revenue v. Bonney, 75 Fed. (2) 1008 (C. C. A. 2), and Commissioner v. Dunham, 73 Fed. (2) 752 (C. C. A. 7).

The third reason assigned for the granting of the writ —namely, that the Circuit Court of Appeals in the instant case erred in holding that there was no evidence to support the conclusion of law of the trial court that the transfers were made in contemplation of death, for the reason that the trust instruments provided for the distribution of the corpus of the estates at the death of the grantor— is without merit. A contrary holding by the Circuit Court of Appeals would have conflicted with the decisions of this Court in

Reinecke v. Northern Trust Company, 278 U. S. 389;
May v. Heiner, 281 U. S. 238;
McCaughn v. Carnill, 43 Fed. (2) 69 (C. C. A. 3), certiorari denied 283 U. S. 825;
Hodgkins v. Commissioner, 44 Fed. (2) 43 (C. C. A. 7), certiorari denied 283 U. S. 825;
Burnet v. Northern Trust Company, 283 U. S. 782;
Morsman v. Burnet, 283 U. S. 783;
McCormick v. Burnet, 283 U. S. 784;

in all of which cases no distribution of the trust property could have been made except upon or with reference to the death of the grantor, and in each of these cases it

was either expressly held that the trusts were not created in contemplation of death or it was conceded by the Government that this fact had no tendency to establish that the trusts were so created.

In conclusion, it is respectfully submitted that the reasons advanced in the petition herein lack the merit required by rule 38 and, therefore, the petition should be denied.

Respectfully submitted,

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Attorneys for Respondents.

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No. 262.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1935.

LOUIS J. BECKER, Collector of Internal Revenue,
Petitioner,

v.

ST. LOUIS UNION TRUST COMPANY, a Corporation, and WILLIAM EDWIN GUY, Executors of the Estate of WILLIAM EVANS GUY, Deceased,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS.

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IN THE

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v.

ST. LOUIS UNION TRUST COMPANY, a Corporation, and WILLIAM EDWIN GUY, Executors of the Estate of WILLIAM EVANS GUY, Deceased,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR RESPONDENTS.

OPINIONS BELOW.

The opinion of the District Court (R. 16) is not officially reported. The opinion of the Circuit Court of Appeals (R. 124) is reported in 76 Fed. (2) 851.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered March 13, 1935, and a petition for rehearing was denied April 19, 1935 (R. 145). The petition for certiorari was filed July 19, 1935, and was granted October 14, 1935. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

The decedent executed four identical declarations of trust naming one of his four children as beneficiary in each, by which he declared that he held in trust for the beneficiary the property therein described. Each trust instrument provided that if the beneficiary should die before the settlor the trust property should revert to the settlor and become his immediately and absolutely; or, if the settlor should die before the beneficiary, then the trust property should become the beneficiary's immediately and absolutely, and, in either case, the trust should cease. The question presented is:

> Whether the property so transferred in trust by the decedent should be included in his gross estate because the transfer (a) was made in contemplation of death, or (b) was intended to take effect in possession and enjoyment at or after his death within the meaning of Section 302 (*c*) of the Revenue Act of 1926.

STATUTE INVOLVED.

Revenue Act of 1926, c. 27, 44 Stat. 9:

> Sec. 302. The value of the gross estate of the

decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possesion or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * * * *

(h) Except as otherwise specifically provided therein, subdivisions (b), (c), (d), (e), (f) and (g) of this section shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after the enactment of this act.

* * * * * * *

(U. S. C., Title 26, Sec. 1094.)

STATEMENT.

For a statement of the case, we quote from the opinion of the Circuit Court of Appeals (R. 124):

The facts—as to which there is virtually no dispute—are as follows:

William Evans Guy, on January 3, 1921, executed four separate written declarations of trust, one for each of his four children, who at that time had reached their major-

ity. By each of the trust instruments he conveyed to himself, as trustee, certain securities of the par value of $72,000, the aggregate value of the securities at that time being $288,000. From time to time thereafter he made additions to these trusts, and at the time of his death on July 24, 1928, the total value of the trust property included in the four trusts was $994,195. This amount the Commissioner of Internal Revenue included as a part of the gross estate of the decedent, under Revenue Act of 1926, Section 302 (26 U. S. C., Sec. 1094), and the appellants, his executors, after paying the additional estate tax which resulted, brought this action to recover it.

The four declarations of trust were identical, with the exception of the name of the beneficiary. The declaration of trust for Evelyn S. Guy is typical of each of the trusts, and, so far as pertinent, is as follows:

> "I, William Evans Guy, of the City of St. Louis, and State of Missouri, hereby declare, this third day of January, 1921, that I hold in trust for my daughter, Evelyn S. Guy, the following property, to wit:"
>
> (Here follows description of securities);
>
> "with the powers and for the uses and purposes hereinafter set forth, as follows:
>
> "1. I am to have the power at any time, and from time to time, to sell any of the trust property or estate, *for such price and prices as I may determine.* Any money coming into my hands as the proceeds of any such sale or otherwise and forming a part of the principal of said trust estate shall as soon as practicable, be reinvested by me. In making such investments, I am to have full power to purchase any property, real or personal, which I may think desirable to acquire or hold as part of the said trust estate, and I am not to be restricted to the purchase of such property as is

ordinarily deemed advisable for trust property. I am likewise to have the power to rent or lease any and all real estate which may be included in said trust property for terms of any duration, whether such terms shall extend to a time beyond the termination of this trust or not. I am likewise to have full power and authority in my discretion to borrow money and secure the sums so borrowed by pledge or mortgage of any and all portions of said trust estate and I may out of the corpus or income of said trust estate, or out of both such corpus and income repay the sums so borrowed. I am to have full authority to invest or reinvest any sums so borrowed; and to collect and receive the rents, income and profits arising from the trust estate therein created. It being my intention to retain *as trustee* [italics ours] such rights, power and authority in respect to the management, control and disposition of said trust estate for the use and benefit of the beneficiary, as I have with respect to property absolutely owned by me.

"2. Out of the income and revenue accruing from said trust estate I shall have power to pay all taxes, expenses necessarily or properly incident to its care, preservation and management; and all other reasonable or necessary charges incident to the administration of the trust created hereby, and out of the remaining income and revenue, I am to pay the beneficiary of this trust an allowance of $300.00 a month, with power in my discretion from time to time to increase or decrease the said allowance whenever I may deem it to be to the best interest of the said beneficiary, to have such allowance increased or decreased. I shall have the power, from time to time, out of the remainder of said income and revenue, to appropriate and pay such sums as I may deem reasonably necessary for the maintenance, support and education of said beneficiary. Any income not distributed as

hereinabove provided shall be added to the principal of the trust estate.

"3. In case of an emergency, or illness of said beneficiary, requiring a greater sum than that accruing as income of revenue, I shall have the power to use as much of the principal of said trust estate as may be absolutely necessary.

"4. Any receipt given by the beneficiary of this trust to me for any sum paid to her by me, shall be a full acquittance and discharge for the payment mentioned in such receipt.

"5. The foregoing provisions for my said daughter, Evelyn S. Guy, shall be for her sole and separate use, free from all statutory and marital rights of her husband; and free from her debts and without the right on her part to assign, pledge, hypothecate, or anticipate, or in any way create a lien upon any of the income or corpus of the trust estate hereby created before she shall receive the same, nor shall any of the said income or corpus be subject to any claims of any persons who may at any time be creditors of my said daughter.

"6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease."

(Signed) William Evans Guy.

Witness:

Wm. Edwin Guy."

In 1921, at the time these trusts were made, Mr. Guy was 76 years of age. Long prior to that time he had retired from the active management of any corporations in

which he was interested, but he conducted his own affairs, which were extensive, and continued as a director of the St. Louis Cold Storage Company, the Laclede Steel Company, and as trustee and director in several syndicates. He maintained a downtown office, where he went every business day when the weather was good, from September to June, which was the portion of the year that he spent in St. Louis. He took an active interest in all matters with which he was connected. He made a practice of consulting his physician on an average of about once in six months, and enjoyed almost perfect health for a man of his years. He had not consulted his physician for some time prior to the date of the execution of the trusts, so far as the physician could remember. In June, 1928, about two months prior to his death, he had had a physical examination, which disclosed no change in his condition. He was an optimistic and cheerful man, and exceptionally alert mentally. He came of a long-lived family, and frequently had made the statement that he expected to live to be at least ninety. It seems that two of his immediate ancestors had lived beyond that age. None of his friends knew of any ailment which might have led him to suspect that his death was to be expected in the near future. He was careful of his health, but obviously not concerned about death. In fact, the evidence indicates that he was, at the time these trusts were executed, in as good physical and mental condition as possible for any man of his years. His purpose in making the four trusts, as expressed to his son (who drafted the instruments) and to at least one of his friends, was to make his children independent of him, to enable them to know what they might expect each year, in lieu of an allowance out of his own income, and to avoid the high surtax which would be imposed upon his income if he retained his property for himself.

The action was tried to the court below without a jury. Two questions were presented:

1. Was the transfer of the property included in these four trusts intended to take effect in possession or enjoyment at or after death?

2. Were the transfers made in contemplation of death?

The court below found that none of the beneficiaries named in the trust instruments acquired custody, control or title to the corpus of the trust prior to the death of the settlor; that the title of the beneficiaries was contingent upon their survival of the settlor; and that the motive for the creation of the trusts was to decrease the settlor's income taxes by distributing the property and thus avoiding the high rate for large incomes, and at the same time to make provision for the distribution of the property included in the trusts at the settlor's death. The Court concluded that the corpus of the trusts was transferred in contemplation of death, that the transfers were intended to take effect in possession and enjoyment at and after death, and that the value of the trust property was therefore properly included in the gross estate.

The Circuit Court of Appeals held that the transfers were not intended to take effect in possession or enjoyment at or after the death of testator and that there was no evidence to support the conclusion of the trial court that the corpus of the trusts was transferred in contemplation of death.

SUMMARY OF ARGUMENT.

I.

The Circuit Court of Appeals correctly ruled that there was no evidence that the trusts were created in contemplation of death. The provision in each instrument relating to distribution of the trust property at decedent's death did not afford such evidence. Similar provisions have been held repeatedly not to make the instruments containing them testamentary in character.

II.

The trusts were not intended to take effect at or after decedent's death.

(a) The tax imposed by Section 302 (c) of the Revenue Act of 1926 is a transfer tax upon the transmission of property from the dead to the living as distinguished from a succession tax upon the right of the living to receive property from the dead. It is not the interest to which a person succeeds upon the death of another but the interest of the decedent which ceases by reason of death which is the subject of the tax.

(b) The instruments in question effected complete and irrevocable gifts in praesenti and completely divested the decedent of all beneficial interest in the trust property. They created determinable fees in the respective beneficiaries, the enjoyment, but not the interest, being postponed until the expiration of the trust period, and after their execution the decedent's only interest was a bare possibility of reverter.

(c) Although not decisive, it may be noted that neither the postponement of actual possession nor the provision

for the accumulation of income nor the fact that the interest of the beneficiary might be divested if his death occurred prior to that of the grantor prevented the interests of the respective beneficiaries from vesting upon the execution of the instruments.

(d) It is established by the controlling decisions of this Court, namely, May v. Heiner, 281 U. S. 238, and McCormick v. Burnet, 283 U. S. 784, that the obliteration by the decedent's death of the possibility of reverter which was lodged in him was not the occasion of the transfer of any interest in the property from the decedent to the beneficiary, nor did it constitute such a shifting of economic benefits by reason of death as will render the corpus of the trust estate subject to estate taxes.

(e) The present case is distinguished from the case of Klein v. United States, 283 U. S. 231, and Commissioner v. Schwarz, 74 Fed. (2) 712, by the fact that in those cases only a life estate was presently granted with provision for transfer of the reversion upon the happening of a condition precedent, whereas here a fee was presently granted, subject to be defeated by a condition subsequent; this distinction is emphasized by the fact that in those cases only the value of the property after deducting the value of the life estate so granted was included in the gross estate of the decedent, whereas the value of the entire trust property is here sought to be so included.

(f) The fact that immediately after this Court decided the cases of Burnet v. Northern Trust Company, 283 U. S. 782; Morsman v. Burnet, 283 U. S. 783, and McCormick v. Burnet, 283 U. S. 784, Congress amended the Revenue Act of 1926 so as to tax specifically transfers where the decedent retained the income from the trust property for life or the power to direct who should receive the income

from the property, but made no effort to bring transfers in which there was a possibility that the trust property might revert to the grantor within the specific provisions of the act is persuasive evidence that Congress has never intended to tax transfers of the latter type as being intended to take effect at death.

(g) The question presented is not whether Congress has power to tax transfers of the nature here involved, but whether the present transfers can be characterized as intended to take effect in possession and enjoyment at or after grantor's death. Any doubt that the present transfers come within that category is to be resolved in favor of the taxpayer.

ARGUMENT.

CONTEMPLATION OF DEATH.

In his petition for certiorari petitioner urged that the provisions in each trust instrument relating to the distribution of the trust property at the death of the decedent afford evidence to support the conclusion of the trial court that the trusts were created in contemplation of death and that the court below erred in finding to the contrary. It is respectfully submitted that this contention is without merit upon the authority of

Helvering v. Duke, 290 U. S. 591;
Reinecke v. Northern Trust Company, 278 U. S. 389;
May v. Heiner, 281 U. S. 238;
McCaughn v. Carnill, 43 Fed. (2) 69 (C. C. A. 3), certiorari denied 283 U. S. 825;
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Morsman v. Burnet, 283 U. S. 783;
McCormick v. Burnet, 283 U. S. 784;
In re Estate of Soulard, 141 Mo. 642, l. c. 664, 43 S. W. 617.

The trusts involved in all of these cases contained similar provisions and in all of the Federal cases it was either expressly held or stipulated that the trusts were not testamentary in character and were not created in contemplation of death, and in the Missouri case it was held that the trust was not testamentary in character.

THE TRUSTS WERE NOT INTENDED TO TAKE EFFECT AT OR AFTER THE DECEDENT'S DEATH.

Nature of Tax Involved.

The tax imposed by Section 302 (c) of the Revenue Act of 1926 is a transfer tax upon the net estate of the decedent which passed from the decedent to living persons by reason of decedent's death. It is a tax upon the right to transmit property by death, as distinguished from an inheritance or succession tax upon the right of the living to receive property from the dead. It is the cessation of the interest of the decedent and the transmission of that interest to the living, rather than the receipt of property by the living from the dead, which is the subject of the tax.

In Young Men's Christian Association v. Davis, 264 U. S. 47, 44 S. Ct. 291, 68 L. Ed. 558, this Court says, l. c. 50:

> "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeed on death, but the interest which ceased by reason of the death (Knowlton v. Moore, 178 U. S. 41, 48, 49)."

In Edwards v. Slocum, 264 U. S. 61, l. c. 62, 44 S. Ct. 293, 68 L. Ed. 564, the same Court says:

> "But this is not a tax upon a residue; it is a tax upon a transfer of his net estate by a decedent, a distinction marked by the words that we have quoted

from the statute, and previously commented upon at length in Knowlton v. Moore, 178 U. S. 41, 49, 77. It comes into existence before and is independent of the receipt of the property by the legatee. It taxes, as Hanson, Death Duties, puts it in a passage cited in 178 U. S. 49, 'not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death.' "

In Reinecke v. Northern Trust Company, 278 U. S. 339, 49 S. Ct. 123, 73 L. Ed. 410, the same Court says, l. c. 348:

"In the light of the general purpose of the statute and the language of section 401, explicitly imposing the tax on net estate of decedents, we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402 (c), 'to take effect in possession or enjoyment at or after his death,' include any others than those passing from the possession, enjoyment or control of the donor at his death, and so taxable as transfers at death under section 401. That doubt must be resolved in favor of the taxpayer."

In the dissenting opinion of Roberts, J., in Coolidge v. Long, 282 U. S. 582, 51 S. Ct. 306, 75 L. Ed. 562, the Justice says, l. c. 609:

"Since no one has the natural right, either to own property or to transfer it to others at his death, but derives the power so to do solely from the state, the sovereignty may tax the owner for the privilege of transmission conferred by law (United States v. Perkins, 163 U. S. 625). The right to receive and enjoy that which was formerly owned by another is similarly derived, and upon like principles the sovereignty may tax the taker for the privilege accorded. (Citing cases.) So distinct are those privileges that

either or both may be taxed as respects the same property. (Citing cases.)

"The one is collected on a transfer of his estate by the decedent; it taxes not that to which some person succeeds upon a death, but that which succeeds by reason of death (Nichols v. Coolidge, 274 U. S. 531, l. c. 537; Edwards v. Slocum, supra). The other is laid upon the right to become beneficially entitled to property on the death of its former owner."

In Nichols v. Coolidge, 274 U. S. 531, 537, 47 S. Ct. 710, 71 L. Ed. 1184, the foregoing quotations from Edwards v. Slocum, supra, and Young Men's Christian Association v. Davis, supra, are quoted with approval.

In Ithaca Trust Company v. United States, 279 U. S. 151, l. c. 155, 49 S. Ct. 291, 73 L. Ed. 647, this Court, speaking through Mr. Justice Holmes, said:

"The tax is on the act of the testator, not on the receipt of property by the legatee."

In Allen v. Henggeler, 32 Fed. (2d) 69 (C. C. A. 8), this Court says, l. c. 71:

"It has been conclusively determined that the Federal Estate Tax is not levied on the right of inheritance; it is levied and measured by the interest or rights cut off by death (citing the Supreme Court cases cited, supra).

"Decisions under state laws taxing the right of succession or taxing property which pass by will or inheritance are, therefore, not in point." • • •

From the foregoing it is quite clear that what we are concerned with here is whether or not Mr. Guy individually retained any interest in the trust property after the execution of the declarations of trust, which remained in

him to be transferred from him to the living as an incident of his death. The nature of the interests of the beneficiaries and the trustee are not important except in so far as they throw light upon the question of Mr. Guy's individual interest. If Mr. Guy divested himself fully, completely and irrevocably of all interest in the trust property which might inure to his benefit, no interest therein remained to be so transferred and there is no basis for the tax.

Duke v. Commissioner, 23 B. T. A. 1104, l. c. 1112.

Nature of Estates Created.

Where an instrument, by appropriate language, grants a fee to a named person and there is coupled with such grant a further provision that upon the happening of a certain condition or contingency, which may never happen, the estate so devised may be determined, the instrument creates a base, qualified or determinable fee.

Thompson, Construction of Wills, 1st Ed., Sec. 377, p. 508;
Washburn on Real Property, 4th Ed., Vol. 1, p. 88 et seq.

The conditions or contingencies which defeat a qualified or defeasible fee are various, the most common being death without issue of the first taker, or his death intestate without leaving issue or descendants of issue, or his death without leaving a wife or husband or child or children, or his death before distribution, or his death before attaining a certain age, or before another person.

Thompson, Construction of Wills, 1st Ed., Sec. 377, p. 509.

Where such an estate is granted with the provision that upon the happening of a contingency which may or may not happen it shall revert to the grantor, the only interest which the grantor retains is the possibility of having the fee again—a mere possibility of reverter which at common law is not an estate. It is inalienable, unassignable and not devisable, unless made so by statute. Until the contingency happens the whole title is in the grantee.

In Tiedeman on Real Property, 3rd Ed., Sec. 291, p. 431 et seq., the author says:

> "A reversion is that estate which remains to an owner of land after he has conveyed away a particular estate. It is a vested estate of future enjoyment, the possession of which is postponed until the determination of the estate granted. There is always a reversion as long as the entire fee has not been exhausted. Thus, after any number of successive estates for life or for years, there is still a reversion left in the grantor. So, also, is there a reversion after an estate-tail, although there was none after the fee conditional at common law, which the statute 'de donis' converted into an estate-tail. But where one grants a base or determinable fee, since what is left in him is only a right to defeat the estate so granted upon the happening of a contingency, there is no reversion in him. That is, he has no future vested estate in fee, but only what is called a naked possibility of reverter, which is incapable of alienation or devise, although it descends to his heirs. But where the particular estate is an estate upon limitation, and more particularly where it is limited by the life of a person, or by a contingent event, which may cause it to last during some life, the estate will not be such a determinable or qualified fee as does not admit of a reversion, although the estate be granted to A and

his heirs. Thus, a limitation to A and his heirs during the widowhood of B or the residence of C in Rome, would be a life estate, and there would be a reversion left in the grantor instead of a possibility of reverter. A grant to A and his heirs, as long as a tree stands, would likewise leave a reversion in the grantor. But a grant to A and his heirs until B returns from Rome would be a fee upon limitation, and since it is doubtful if the contingency will happen, and if it does not, the estate becomes an absolute fee in the grantee, the grantor has only a possibility of reverter, and not a reversion."

There can be no question that the granting clause in each declaration of trust was sufficient to transfer the entire estate in the property described out of Mr. Guy individually and vest the legal estate therein in himself as trustee and the beneficial interest in the beneficiary. The language is:

"I, William Evans Guy, * * * do hereby declare that I hold in trust for (naming one of his children) the following described property, to wit: (describing the securities), with the powers and for the uses and purposes hereinafter set forth * * *."

See Northrip v. Burge, 255 Mo. 641, 164 S. W. 584; Rollestone v. National Bank of Commerce, 299 Mo. 57, 252 S. W. 394; Korompolis v. Tom Pras, 251 S. W. 80.

The granting clause above quoted, standing alone, would have created merely a passive trust and would have transferred the entire title, legal and equitable, to the beneficiary. This was prevented by the active duties of management imposed on the trustee and the power given the trustee to pay over the income to the beneficiary or

apply the same for his or her benefit or to permit it to accumulate for his or her benefit, in the discretion of the trustee. By the last clause of each instrument it was provided that, in the event the beneficiary should predecease him, the trust property was to revert to Mr. Guy. This provision very obviously did not prevent the granting clause from operating at all, but did have the effect of attaching thereto a condition subsequent upon the happening of which the estate which had already passed to the trustee and beneficiary by virtue of the granting clause should determine and revert to Mr. Guy. In Woods v. Woods, 87 Ga. 562, 13 S. E. 692, the Court held that by a limitation in a deed in trust to a wife in fee which provided that in the event she should predecease grantor the property should revert back to the grantor, the grantor had a mere possibility of reverter. The Missouri courts have passed on the same situation. In Deacon v. St. Louis Union Trust Company, 271 Mo. 669, 197 S. W. 261, the will of the testatrix devised her property to a trustee for the following purposes:

"1st. • • •

"(4) To make division of all my property and the increase thereof at the expiration of thirty years from death amongst my children hereinafter named. Such division may be made in kind, if practicable, or the trustee may sell the whole or any portion thereof, if necessary or convenient in making such distribution. • • •

"(6) The children for whom provision is made herein are the children of my late husband, Jordan W. Lambert, and myself, to wit: Albert, Jordan, Marion, Lily, Gerard and an unborn child of which I am now enceinte. • • •

"(8) In case any child or children shall die before

final distribution, the issue of such child shall have all the rights of the parent, taking per stirpes; but if no issue survive, the share of such deceased child or children shall pass to the survivors of my said children, or their issue, the issue in all cases taking per stirpes.

"3rd. During the minority of my children, and each of them, no greater sum shall be paid over by the trustee to or for any child than shall be reasonably necessary or proper for its support, education and maintenance, according to its estate and condition in life. The excess, if any, of any child's income shall be vested and accumulate till it becomes of age and then be paid over to it."

The Court, with regard to the effect of the provision that each child's share might be defeated by his death prior to distribution, said (l. c. 689):

"It is contended, however, that paragraph 8 of item 1 of the will operates to limit the estate of each child to the condition that they be alive when division is made and that this constitutes a condition precedent and not subsequent. In other words, that the vesting of the trust estate is postponed by this condition and a future estate created contrary to the rule against perpetuities, because of the postponement of the vesting of the estate."

The Court then sets out paragraph 8, supra.

Continuing:

"The inquiry confronting us is the meaning to be placed upon this paragraph. Does it operate to change the prior words of the will from a present interest to one to be vested in the future, and hence in violation of the rule above referred to, or does it simply change or modify the absolute estate vested in

each child by prior provisions of the will into one subject to be divested by a condition subsequent? * * *

"The effect of clause 8, therefore, is to modify the absolute estate vested in each child by the prior provisions of the will, into a present interest, but one subject to be divested by a condition subsequent, namely, death before the end of the trust period, leaving or not leaving issue, as the case may be, thus creating a defeasible instead of an absolute fee. * * *

"* * * The interest of the parents, as we have seen, is that of a defeasible fee. After a fee, nothing remains."

In Pollard v. Union National Bank, 4 Mo. App. 408, Isaac J. Pollard conveyed the real estate in question to Thomas Skinker, trustee for Susan M. Pollard, his wife, by a deed, the habendum clause of which was in the following words:

"To have and to hold the said parcel of ground unto the said Skinker and his heirs forever, upon trust, nevertheless, for the sole and separate use of the said Susan M. Pollard, and subject to the following conditions and stipulations, to wit: If the said Susan M. shall die before the said Isaac J. Pollard, then the property hereby conveyed shall revert to him, the said Isaac J. Pollard; but if he shall die first, then the said property shall remain in the said Susan M., her heirs and assigns forever, subject to her absolute control and disposition."

Susan Pollard died leaving her husband surviving her and he conveyed the property. The question was whether the husband's transferee or the heirs of Susan M. Pollard were entitled to the property. It will be seen that the language of the trust instrument, to wit: "If the said Susan M. shall die before the said Isaac J. Pollard, then the property hereby conveyed shall revert to him, the

said Isaac J. Pollard; but if he shall die first, then the said property shall remain in the said Susan M., her heirs and assigns forever, subject to her absolute control and disposition," is practically identical with the language of the trusts here involved. It was contended by the heirs that the provision for the reverter to the grantor was void as being based upon a fee. The Court, however, held that an equitable fee was created in the wife, subject to be defeated upon the happening of a contingency with a possiblity of reverter in the grantor; that such contingency had happened; and that the husband's transferees were entitled to the property. In arriving at this conclusion, the Court says:

> **"There may be several defeasible fees, and, upon these being defeated, the use may revert to the settler. * * *"**
>
> **"Marked features of the present case are the prominence and plainness given to the terms making the grant to Susan M. Pollard conditional and determinable, and the apt words used to preserve the property though perhaps in another and more advantageous form, in case of the happening of the contingency upon which there was to be a reverter."** (Emphasis ours.)

Patrick v. Blair, 119 Mo. 105, 24 S. W. 767—In this case McManus conveyed certain real estate to Blair, as trustee, with full power to hold and use the same and the income and profits therefrom to the sole and separate use of Camille Patrick, free from the debts and control of any future husband she might have. He further provided that when Camille arrived at the age of 18 years said Blair should convey and set over to her by proper deeds of conveyance to her sole and separate use one-half of the property, together with one-half of all rents and profits

then in the hands of the trustee, and provided also that the said Blair should retain the other one-half to the use of Camille until she arrived at the age of 25 years and should then convey and transfer to her all the estate in his hands.

The instrument further provided that should Camille die leaving no issue before reaching 25 years of age, then the said trustee should convey over to one Patrick (Camille's father), or his heirs, one-sixth of all the estate in the hands of the trustee, and the remaining five-sixths should be conveyed back to McManus. It further provided that should the said Patrick have repaid the trust estate the sum of $4,000, then "at the time of the death of Camille without issue and before reaching the age of 25 years, the trustee should convey one-third of the trust estate to Patrick and two-thirds to McManus."

Camille died at the age of 7, leaving no brothers and sisters. Suit was brought which required the construction of the trust instrument, and the Court said:

> "That the said Camille took a vested estate in the property is not open to serious doubt."

And again (l. c. 114) the Court says:

> "Though the estate of the beneficial grantee was vested, whether in remainder or as a conditional or base fee, it was also determinable upon the happening of certain events therein named. Upon the occurrence of these events the estate, which vested in the beneficiary, became divested and an estate over was substituted.
>
> "Reading the entire instrument in the light of the circumstances under which it was made, there can be no doubt that the testator intended thereby to dispose of the entire estate and that no part thereof should pass by descent to the heirs of Camille, should

she die before reaching the age of 25 years. The language leaves no doubt that in the event of her death before coming into the estate herself, her children should take, if she should leave children, all that remained, not as an inheritance from her, but as a limitation over under the deed. This fact is significant in showing the intent to dispose of the whole estate under the deed, as without the limitation to the children of Camille, the estate being vested in her, they would have inherited the same estate from their mother. The second event named upon the happening of which the estate was limited also made disposition of the whole of it. Should the said Camille marry and die without issue before reaching the age of 25 years, then five-sixths should go to the grantor McManus, and one-sixth to Patrick. The same purpose is here also manifest, as, on the happening of the event named, Patrick, her father, as her only heir at law, would have inherited from her such portion as was not limited to the grantor."

In Coolidge v. Long, 282 U. S. 582, 51 S. Ct. 306, 75 L. Ed. 562, the trust provided that the income of the trust property was to be paid to each of the settlors during their joint lives and then the entire income to the survivor and upon the death of the survivor the principal was to be divided equally among their five sons, provided that if any of the sons should predecease the survivor of the settlors his share should go to those entitled to take his intestate property under the Statute of Distribution in force at the date of the death of such survivor, with the further provision that in no event should the widow of any deceased son take as a distributee more than half of such share. This Court said (l. c. 597):

"By the deed of each grantor one-fifth of the remainder was immediately vested in each of the sons

subject to be divested only by his death before the death of the survivor of the settlors. It was a grant in praesenti to be possessed and enjoyed by the sons upon the death of such survivor (Blanchard v. Blanchard, 1 Allen 223; Clarke v. Fay, 205 Mass. 228; McArthur v. Scott, 113 U. S. 340, 379, and cases cited; and see United States v. Fidelity Trust Co., 222 U. S. 158; Henry v. United States, 251 U. S. 393). The provision for the payment of income to the settlors during their lives did not operate to postpone the vesting in the sons of the right of possession or enjoyment. The settlors divested themselves of all control over the principal; they had no power to revoke or modify the trust (Coolidge v. Loring, supra, 223). Upon the happening of the event specified, without more, the trustees were bound to hand over the property to the beneficiaries. Neither the death of Mrs. Coolidge nor of her husband was a generating source of any right in the remaindermen (Knowlton v. Moore, 178 U. S. 41, 56). Nothing moved from her or him or from the estates of either when she or he died. There was no transmission then. The rights of the remaindermen, including possession and enjoyment upon the termination of the trusts, were derived solely from the deeds. The situation would have been precisely the same if the possibility of divestment had been made to cease upon the death of a third person instead of upon the death of the survivor of the settlors."

In Edson v. Lucas, 40 Fed. (2nd) 398 (C. C. A. 8), the Government sought to collect income taxes from Mrs. Edson upon the profits from the sale of 708 shares of stock which she, Mrs. Edson, had caused to be transferred from her brokerage account to the account of her daughter, Mrs. Pratt. After the transfer had been effected, Mrs. Edson wrote to her daughter as follows:

"To Mrs. Geraldyne Edson Pratt:

"Dear Geraldyne: I have transferred to you two hundred shares of Texas Oil Company stock as a gift, with this reservation, that when you sell the stock you invest the proceeds in United States Government securities, to so remain during your life, with the further understanding that no part of the principal will be disposed of either by sale or used for loan.

"The income use as your best judgment may dictate.

"Should death occur to you before either your father or myself, then the securities will revert to me, otherwise to him.

"If married and no issue, the preceding paragraph will prevail.

"If issue, the securities will be left in trust for the issue.

"Your mother,

"(Signed) Mrs. J. A. Edson.

"Accepted:

"(Signed) Geraldyne Edson Pratt."

This Court held that there was a valid, complete gift of the stock in praesenti and that Mrs. Edson was not taxable for the profits realized on the sale thereof. On page 405 the Court said:

"Nor would it seem to be less a gift because accompanied by words indicating that it was 'provisional,' as in the case of Flint v. Ruthrauff, supra, or so expressed as to make it, though presently vested, subject to defeasance by the death of the donee before the donor, as surely a gift by will or formal deed of trust might be expressed."

On page 406 the Court said:

> "After Mrs. Edson parted with this property, in 1919, she had neither the legal title, nor possession, nor control, nor the income, nor the proceeds, and, if the theory of the Board should be sustained, she had nothing left as an incident of ownership except a mere expectancy and the duty of paying an income tax upon profits which she has never received and in all probability can never receive."

See, also:

> Flint v. Ruthrauff, 26 App. Div. 624, 53 N. Y. S. 206, affirmed 163 N. Y. 588, 57 N. E. 1109;
> Richardson v. Stodder, 100 Mass. 528.

After the granting of a defeasible fee nothing remains in the grantor but a possibility of reverter. Tiedeman on Real Property, 3rd Ed., Sec. 291, p. 431, supra; Deacon v. St. Louis Union Trust Co., supra; Copenhaver v. Pendleton, 155 Va. 463, 155 S. E. 802, 77 A. L. R. 324, l. c. 330, 331.

In this respect the present case differs substantially and materially from Klein v. United States, 283 U. S. 231, and Commissioner v. Schwarz, 74 Fed. (2) 712 (C. C. A. 2). Here a defeasible fee was granted. In those cases only a life estate, a particular estate which was certain to end, was presently granted, and the transfers of the reversion in the Klein case and the contingent remainders in the Schwarz case were made to depend upon the happening of a condition precedent, namely, the death of the grantor prior to the termination of the particular estate.

> "Upon a grant or devise of a particular estate limited to determine upon the happening of an event

which is certain to happen, with a contingent remainder over, there remains in the grantor or devisor a reversion, subject to be defeated by the happening of the contingency upon which the remainder is conditioned." Copenhaver v. Pendleton, 155 Va. 463; 155 S. E. 802; 77 A. L. R. 324, l. c. 342.

In this case each beneficiary was ascertained and the property was presently transferred for his benefit under the express provisions of the instruments. Each took the fee to the trust property immediately, the absolute enjoyment thereof being postponed until the expiration of the trust. Coolidge v. Long, supra; Deacon v. St. Louis Union Trust Company, supra. Nothing could prevent the vesting in enjoyment but the death of the beneficiary prior to the expiration of the trust. No reversion remained in Mr. Guy, only a possibility of reverter. In law as well as in fact he had parted with all beneficial interest in the property.

This distinction is emphasized by the fact that in the Klein and Schwarz cases only the value of the property after deducting the value of the life estate was sought to be included in the gross estate of the decedent, whereas here, as in May v. Heiner, 281 U. S. 238, and McCormick v. Burnet, 283 U. S. 784, the entire value of the trust property is sought to be so included.

It is respectfully submitted that Mr. Guy, by the instruments in question, completely and irrevocably divested himself of all interest in the trust property and that the only interest he had therein at the time of his death was a mere possibility of reverter which was extinguished by his death, and that no interest in the property passed from Mr. Guy to the beneficiaries or any other living person by reason of his death. The effect of the provision

in the trust instruments for a reverter of the property to Mr. Guy in case the beneficiary should predecease him was to attach to an equitable fee a condition subsequent upon the happening of which the fee might have been defeated and determined. The attaching of this condition rendered the fee of the beneficiary a base or conditional fee, but it did not prevent the entire legal estate from passing to the trustee and the entire equitable estate to the beneficiary at the time of the execution of the instrument, and left no alienable, assignable or devisable interest to Mr. Guy. His interest was merely the possibility of a reverter and until the happening of the contingency the whole legal title was in himself, as trustee, and the whole equitable title in the beneficiaries.

Interests of Beneficiaries Vested Although Question Not Important.

Whether the estate which the beneficiary took upon the execution of the trust was vested or contingent is in no way decisive of the question of taxability in view of the nature of the tax here involved.

In McCormick v. Commissioner, supra, which we will discuss more fully later, the Board of Tax Appeals said (l. c. 436):

> "Except for an ingenious argument of the respondent we might well hold with our prior decisions which we deem in accord with Nichols v. Coolidge, supra, and hold that a trust created in 1918 is not to be included in the gross estate of a decedent dying under the Act of 1921. The respondent's argument, however, compels us to consider whether or not the retroactive feature condemned by the Supreme Court is present. The argument is based upon the decision

of the Supreme Court of Illinois in People v. McCormick, 327 Ill. 547, 158 N. E. 861, construing this trust instrument. The holding of the Supreme Court of Illinois, briefly stated, is that the beneficial interest in the property covered by the trust created by Mrs. McCormick on July 27, 1918, did not vest in her children at that time. It is argued, because the property did not vest in the children at the time the trust was created, that the transfer must necessarily have been as of the date of her death and that, therefore, the application of the act cannot be said to be retroactive. There is a fatal flaw in this argument in that the Supreme Court of Illinois did not decide that Mrs. McCormick did not divest herself of all interest in the property, but merely decided that the property did not vest in her children until after her death. The latter holding is of no assistance in determining the question which we have before us. The Supreme Court of Illinois was considering the question from the standpoint of the Illinois inheritance tax, which differs from the federal tax in that it is a tax upon the right to receive, whereas the federal estate tax is upon the right to transmit."

In Safe Deposit & Trust Company of Baltimore v. Tait, 7 Fed. Supp. 40 (District Court, District of Maryland), the Court says (l. c. 47):

"A study of the cases above cited leads to the conclusion that, where the donor parts with all personal interest in the property, except a life estate, and the transfer is not in fact made in contemplation of death, it is not rendered taxable under subsection (c) by reason of the nature or quality of the estate taken by the named beneficiaries, whether vested or contingent, subject to be divested, or contingent in law or in fact."

Nevertheless, it may be noted that neither the postponement of the actual possession nor the provision for the accumulation of income nor the fact that the interest of a beneficiary might be defeated by his death prior to that of the grantor prevented the interests of the respective beneficiaries from vesting upon the execution of the instrument.

Patrick v. Blair, supra;
Pollard v. Union National Bank, supra;
Shukert v. Allen, 273 U. S. 545, 47 S. Ct. 461, 71 L. Ed. 764;
Deacon v. St. Louis Union Trust Company, supra;
Coolidge v. Long, supra.

In Shukert v. Allen, supra, the instrument in question conveyed the property to a trustee in trust to accumulate the income until February 1, 1951, unless the last of the beneficiaries should have died more than twenty-one years before that date and then to deliver the principal and undistributable income among his three children there named. The Supreme Court said:

> "Although the Circuit Court of Appeals seems to have thought otherwise, the interest of the children respectively was vested as soon as the instrument was executed, even though it might have been divested as to any one of them in favor of his issue, if any, or of the surviving beneficiaries, if he died before the termination of the trust. • • •
>
> "It is not necessary to consider whether the petitioner goes too far in contending that section 402 (c) should be construed to refer only to transfers of property the possession or enjoyment of which does not pass from the grantor until his death. But it seems to us tolerably plain that when the grantor parts with all his interest in the property to other

persons in trust, with no thought of avoiding taxes, the fact that the income vested in the beneficiaries was to be accumulated for them instead of being handed to them to spend, does not make the trust one intended to take effect in possession or enjoyment at or after the grantor's death."

Obliteration of Possibility of Reverter.

We have endeavored in the above discussion to demonstrate that upon principle the petitioner's position is erroneous. The discussion is probably superfluous in view of the fact that the specific argument that a provision in a trust instrument under which the trust property may revert to the grantor upon the happening of a contingency over which he has no control makes the trust property subject to estate tax has on several occasions been considered and rejected by this court.

In May v. Heiner, 281 U. E. 238, 50 S. Ct. 286, 74 L. Ed. 826, Pauline May, wife of Barney May, by written instrument "transferred, set over and assigned" to him and others, as trustees, with power to change the investments, certain described securities—bonds, notes, corporate stocks and money—in trust, to collect the income therefrom and, after discharging taxes, expenses, etc., to pay the balance "to Barney May during his lifetime and after his decease to Pauline May during her lifetime and, after her decease, all the property in said trust in whatever form or shape it may be shall, after the expenses of the trust have been deducted and paid, be distributed equally among" her four children, their distributees or appointees. The Government argued that the fact that the grantor might receive the income from the trust property during her life, in the event she survived her husband, made the trust taxable as one intended to take effect at death. The

Government's brief, as reported in the official reports (l. c. 241), says:

> "In any event, we contend that the termination by death of a contingent life estate will support the tax, which is one imposed upon 'an interest which closed by reason of death' (Y. M. C. A. v. Davis, 264 U. S. 47; Edwards v. Slocum, 264 U. S. 1). The right of the decedent to receive the income of this trust for life in the event she survives her husband is a right which may postpone the enjoyment by the remaindermen of the economic benefits of the property transferred. The termination of this right by the death of the decedent, freeing the remainder of the possibility of its exercise, is a transfer within the meaning of the statute, properly measured by the value of the property thus relieved of the burden."

This argument was disposed of summarily by the Court in a unanimous opinion in the following manner (l. c. 243):

> "The transfer of October 1st, 1917, was not made in contemplation of death within the legal significance of those words. It was not testamentary in character and was beyond recall by the decedent. **At the death of Mrs. May no interest in the property held under the trust deed passed from her to the living; title thereto had been definitely fixed by the trust deed. The interest therein which she possess[illegible] immediately prior to her death was obliterated [illegible]hat event."** (Emphasis ours.)

It has been suggested that this case is not in point because Mrs. May had no possible interest in the corpus. However, the Government argued that the retention of income was equivalent to the ownership of the property. The Court did not pass squarely on this issue ruling instead that Mrs. May did not, at her death, have any inter-

est in the income by reason of the fact that under the instrument the right to receive the income might have reverted to her.

On March 2, 1931, Burnet v. Northern Trust Company, 283 U. S. 782, 51 S. Ct. 342, 75 L. Ed. 1412; Morsman v. Burnet, 283 U. S. 783, 51 S. Ct. 343, 75 L. Ed. 1412, and McCormick et al., Executors, v. Burnet, 283 U. S. 784, 51 S. Ct. 343, 75 L. Ed. 1413, were decided by this Court.

By these decisions it was determined that neither the retention by a grantor of the income from the trust property nor a power of disposition over the income from the trust property and power to reclaim all or a part of the income, nor the possibility that the corpus of the trust would revert to the grantor in the event he survived certain beneficiaries, would render the transfers taxable. All three cases were decided upon the authority of May v. Heiner, supra, and were unanimous decisions.

In Burnet v. Northern Trust Company, supra, the grantor created an irrevocable trust by which he retained a life interest in the income.

In Morsman v. Burnet, supra, the grantor by an irrevocable trust directed that the income from the trust property be paid to him during his life and accumulated for a period of two years after his death, to be distributed to certain named beneficiaries or their survivors two years after the grantor's death.

The McCormick case we shall treat more fully because it is identical in principle with the present case.

This case was instituted in the Board of Tax Appeals, reported in 13 B. T. A. 423, and involved certain transfers made by Mrs. Nettie Fowler McCormick of property in excess of $7,000,000.00. The pertinent provisions of the

trust instrument were as follows: The property was transferred to the United States Trust Company of New York and consisted of some 3,700 shares of the capital stock of the McCormick Harvesting Machine Company. It was provided that during the grantor's life the trustee should accumulate and add to the principal of the trust estate all income except so much as should be required for the following purposes: (1) In case the grantor's income from property of her own not transferred should in any year be less than $250,000.00, the trustee, upon request, should turn over to her such amount of the net income as, when added to her other income, would make her total income $250,000.00 a year; (2) that during the grantor's life the trustee should pay over such sums from the net income of the property to such charitable uses and purposes as the grantor might designate. It was provided that upon the death of the grantor the income of the property should be distributed one-third to each of the grantor's three children so long as they severally lived, and that from and after the death of either of said three children his or her share should be paid over in accordance with any direction in regard thereto contained in his or her last will, and in default of any such directions, then to his or her surviving issue, and in default of such issue, then to the other beneficiaries entitled to participate in the income. It was further provided that the trust should terminate in any event upon the death of the last survivor of the three children of the grantor thereinbefore named, and that it might be terminated during the grantor's lifetime by an instrument in writing signed by the grantor and one or more of her three children. It was further provided:

> "Upon the termination of said trust as aforesaid, either in whole or in part, the trust estate as to which said trust shall be so terminated shall be paid over

and delivered to said party of the first part (grantor) if she shall then be living, and, in the event that she shall not then be living, shall be paid over and distributed as follows:

"(a) One-third thereof to each of the three children of said party of the first part," etc.

The Government contended that the amount of the trust property was properly included in decedent's gross estate for the reason that Mrs. McCormick did not part with the possession and enjoyment of the property included in the trust. The arguments that she did not were based upon the following provisions of the trust instrument: (1) The provision by which she reserved the right to direct the investment; (2) the provision by which she reserved the right to request the issuance of proxies on the stock; (3) the provision for the accumulation of income and the reservation of the right to direct the payment of income to designated charities; (4) the provision by which she reserved the right to be paid a portion of the income of the trust estate in case her income should fall below $250,000.00 in any year; (5) the provision that should the decedent survive the beneficiaries the trust would terminate and she would take the trust property. The Board determined that none of these provisions rendered the trust taxable, *and said:*

"We come to this conclusion by looking at the purpose of Congress, as we conceive it, to include as a measure of the tax estate, in addition to those assets which are held at death, only such assets disposed of prior to death as bore a reasonable relation to the privilege taxed. We are confirmed in this conclusion when we consider that Mrs. McCormick completely divested herself of legal title and beneficial ownership five years prior to her death, subject only to certain

restrictions and contingencies which, in fact, never operated."

Two members of the Board dissented upon the fourth point, which was the right to be paid a portion of the income of the trust in case her own income should fall below $250,000.00 in any one year. The Commissioner appealed to the Circuit Court of Appeals for the Seventh Circuit, which reversed the Board of Tax Appeals in an opinion reported in Commissioner v. McCormick, 43 Fed. (2) 277. As appears from the official report, the argument advanced by the Government was as follows:

(1) The conveyance in trust was revocable;

(2) Mrs. McCormick's retention of the life use of the income from the estate transferred negatived any alleged intention to transfer the use and enjoyment of the economic benefit before her death;

(3) **The transfer of the corpus of the trust was not complete until Mrs. McCormick's death, because of the provision of the trust agreement which necessitated the transfer of the trust property to the decedent in case she survive her three children.** (Emphasis ours.)

The opinion of the Circuit Court of Appeals did not hold that any particular one of the provisions set out above made the transfer taxable, as a matter of law, but seemed to be of the opinion that taken together it was possible to determine, as a matter of fact, that Mrs. McCormick intended the transfer to take effect at her death. One of the grounds for reaching this determination was the presence of the possibility of reversion of the property to the grantor. On page 279 the Court says:

"But another clause of the trust agreement supp[illegible]-

ments this conditionally revocable clause and merits separate consideration. The last paragraph which we have quoted from the trust agreement calls for the payment of the trust estate to settlor in case she survived the beneficiaries. The inferences deducible from such a clause would ordinarily be legal ones, rather than fact conclusions. But the question before us, in view of the statute which makes intention the determinative issue, necessitates a consideration of all the provisions of the trust agreement."

However, the decision of the Circuit Court of Appeals was reversed, and that of the Board of Tax Appeals affirmed in McCormick v. Burnet, 283 U. S. 784.

There can be no distinction in principle between the McCormick case and the present case. In both cases the trust was limited to continue during the grantor's lifetime and to terminate upon the death of the beneficiary or beneficiaries prior to that of the grantor. In the McCormick case the trust property was to revert to the grantor in case she survived her three children. In the present case the trust property held in each trust, in case the grantor survived the child who was the beneficiary of that particular trust, was to revert to the grantor. The fact that in one case it was necessary for the grantor to survive three people and in the other it was only necessary that he survive one goes only to the remoteness of the possibility of reverter. We submit that the degree of remoteness can have no effect upon the principle involved. If the possibility that the fund might revert to the grantor is sufficient in law to make the transfer taxable, it is immaterial whether the possibility rests upon the grantor's surviving one or thirty people. If, however, the remoteness of the possibility is of any consequence, it may be noted that Mr. Guy was fifty years older than his oldest child

and that before he could have actually regained the property which has been included in his estate by the Commissioner he would have had to survive all four of his children.

The McCormick case was decided by the per curiam decision of this Court and is identical in principle with the facts here involved and was conclusive and controlling upon the Circuit Court of Appeals.

After the decision in the McCormick case the Board of Tax Appeals decided the case of Nanaline H. Duke et al., Executors, v. Commissioner, reported in 23 B. T. A., at page 1104. This case involved two transfers by James B. Duke during his lifetime, one dated May 2, 1917, and the other September 4, 1917, by which he conveyed property which had a value in excess of $30,000,000.00 at the date of his death, to himself, as trustee for the benefit of his daughter, Doris Duke, and her descendants. By the first instrument the said James B. Duke transferred to himself, as trustee, and to the Farmers Loan & Trust Company as successor trustee, the property in question, upon the following trusts: The said Duke to continue as sole trustee so long as he should live and with power to collect the income from the trust property and apply it for the personal support, maintenance and education of said Doris Duke and any child or children, descendant or descendants of the same that she may have during the period covered by said trust, at such time or times, in such manner, to such extent and in such amounts as said trustee may, in his sole discretion, deem to be to the best interest of the trust created by said indenture. Section B of said indenture contained the following clause: "Should the said Doris Duke die in the lifetime of the said J. B. Duke, this trust shall immediately cease and determine, and thereupon all properties of every nature then held in trust un-

der and by virtue of this indenture shall go, revert and belong to the said J. B. Duke absolutely, and said trustee or his successor, as such trustee, shall forthwith pay, convey, assign, transfer and deliver the same to the said J. B. Duke."

The second trust instrument made J. B. Duke trustee and Nanaline H. Duke first successor trustee, and the Farmers Loan & Trust Company second successor trustee, and contained substantially the same provisions as to the trustees' duties during the lifetime of himself and his daughter Doris Duke, except that Mr. Duke, as trustee, was given power to pay over to Doris Duke or any child born to her during the trust period the whole or any part or parts of the principal and/or income of the trust estate at such time or times, in such manner, for such purpose and in such amount, kind and value, as he deemed to be for the best interest of the trust created, with provision for the termination of the trust when the entire trust property had been paid over. Section B of this instrument further provided:

> "Should the said Doris Duke die in the lifetime of said J. B. Duke, this trust shall immediately cease and determine and thereupon all properties of every nature then held in trust under and by virtue of this indenture shall go, revert and belong to the said J. B. Duke absolutely, and said trustee or his successor as such trustee shall forthwith pay, convey, assign, transfer and deliver the same to the said J. B. Duke."

The pertinent parts of the opinion of the Board are as follows (l. c. 1112):

> "As stipulated by the parties, we have found that neither of the trust instruments constituted a transfer or created a trust in contemplation of the grantor's

death. The respondent included the value of the trust properties in the decedent's gross estate on the sole ground that the trusts were 'intended to take effect in possession or enjoyment at or after his death.'

"Whether the respondent's action on this point is correct constitutes the question presented for decision here, and its solution must depend upon the nature and extent of the transfers effected by the trust instruments. The tax in controversy is an excise tax laid upon the transfer of property by death, and is measured by the value of the property so transferred. Therefore, if the decedent in this case by the said trust instruments divested himself fully, completely and irrevocably of all interest in the trust property which might inure to his benefit, no interest therein remained to be transferred as an incident of his death, and there is no basis for the tax (Cf. Saltonstall v. Saltonstall, 276 U. S. 260).

"In Reinecke v. Northern Trust Co., 278 U. S. 339, where the applicable statute was Section 402 (c) of the Revenue Act of 1921, which, so far as material here, is substantially the same as Section 302 (c) of the 1924 Act, supra, the Court said:

" 'In its plan and scope the tax is one imposed on transfers at death or made in contemplation of death and is measured by the value at death of the interest which is transferred. • • • One may freely give his property to another by absolute gift without subjecting himself or his estate to a tax. • • •

" 'It is of significance, although not conclusive, that the only section imposing the tax, section 401, does so on the net estate of decedents and that the miscellaneous items of property required by section 402 to be brought into the gross estate for the purpose of computing the tax • • • are either property transferred in contemplation of death or property passing out of the control, possession or enjoyment of the decedent at his death. The two sections read together indicate

no purpose to tax completed gifts made by the donor in his lifetime not in contemplation of death, where he has retained no such control, possession or enjoyment. In the light of the general purpose of the statute * * * we think it at least doubtful whether the trusts or interests in a trust intended to be reached by the phrase in section 402 (c) "to take effect in possession or enjoyment at or after his death," include any others than those passing from the possession, enjoyment or control of the donor at his death and so taxable as transfers at death under section 401. That doubt must be resolved in favor of the taxpayer.'

"The facts of this case bring it squarely within the principles above stated by the Supreme Court. The decedent made an absolute and unconditional gift of the property embraced in the two trusts. It is true the instruments provided that the property should revert to the decedent if the beneficiary predeceased him, but this was a mere possibility which did not, in fact, occur. Such possibility of reversion did not prevent the gift from being complete. In the case of Commissioner v. McCormick, 43 Fed. (2d) 277, the Circuit Court of Appeals for the Seventh Circuit held that the fact that the settlor could revoke the trust if the beneficiary predeceased her was a factor to be considered in determining whether the trust was revocable or whether the gift was to take effect in enjoyment or possession at or after death, but the Supreme Court reversed that decision (McCormick v. Commissioner, 283 U. S. 784) on authority of May v. Heiner. In the case at bar the trust was not revocable. We passed on a similar question in the case of Lillian M. Wheeler, Executrix, et al., 20 B. T. A. 695, and the Supreme Court, in the case of May v. Heiner, 281 U. S. 238, decided the question adversely to the Commissioner.

"In this case the trust was actually created and took effect and the property passed to it before de-

cedent's death. Nothing passed at or after his death. The fact that there was a bare possibility that the property which had already passed to the trust for the beneficiary might revert to the grantor during his lifetime, not by any act on his part, does not have the effect of reserving to the grantor any rights or benefits which passed at or after his death. He might have, by a bare possibility, reacquired the property during his life, but he did not. In the case of a gift by a man to his child or wife there is always a possibility that the donee may die, leaving the grantor sole heir and thus a possibility of the donor reacquiring the property, but clearly this mere possibility is not sufficient to create or reserve in the donor property rights which pass to the donee only at or after the donor's death, where the donee has had both the possession and enjoyment thereof during the donor's lifetime. This might equally be true whether the trust instrument contained any such provision or not. This contingency or possibility did not give the donor any rights of control over the property. He could not have recalled the property to himself. When he died he was not seized or possessed of the property.

"Decedent did not retain control over the economic benefits or enjoyment of the property. He retained no control which might inure to his own benefit. He did not reserve the power to change, modify or revoke the trusts. He could not designate a new and different beneficiary. The fact that he appointed himself trustee with powers to administer the trust properties for the benefit of his daughter does not change the result. (See Lillian M. Wheeler, Executrix, et al., supra.) In Reinecke v. Northern Trust Co., supra, the Court made this point clear in the following language:

" 'Nor did the reserved powers of management of the trust save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and

others had he made himself the trustee, but the transfer would not, for that reason, have been incomplete. The shifting of the economic interest in the trust property which was the subject of the tax was thus complete as soon as the trust was made. His power to recall the property and of control over it for his own benefit then ceased, and as the trusts were not made in contemplation of death, the reserved powers do not serve to distinguish them from any other gift inter vivos not subject to the tax.' (Emphasis supplied.)

"We see no basis for the contention of the respondent that the transfer of the property was contingent. The property was clearly transferred from the decedent by the trust instruments. As above set out, the fact that he was trustee is of no importance. Any uncertainty or contingency as to who might eventually receive the trust corpus as the result of the named beneficiary dying or the fact that under a certain contingency the legal heirs of decedent might receive the property does not indicate that the decedent had not parted with the property and all economic benefits thereof in his lifetime. We cannot overlook the plain fact that the decedent did not own the property or any economic benefits therein when he died or the fact that no economic interests or benefits therein passed at his death. The entire disposition of the property, in so far as the decedent was concerned, was completed during his lifetime. The death of the decedent was not the generating source of any right in any beneficiary. Nothing moved from him on his death, in so far as the property here involved is concerned. It is unimportant that under certain circumstances other or different beneficiaries might eventually, pursuant to the trust instrument, receive the corpus.

"The decedent, however, did not reserve any right to change beneficiaries or to direct any disposition of the property until his death.

"We think the respondent erred in including in the decedent's gross estate the value of the properties embraced in the two trust instruments in question. His action on this point is, therefore, reversed. (See Shukert v. Allen, 273 U. S. 545; May v. Heiner, 281 U. S. 238; Coolidge v. Long, 282 U. S. 582; McCormick v. Commissioner, supra; Lillian M. Wheeler, Executrix, 20 B. T. A. 695.)

"In accordance with the stipulation of the parties, judgment will be entered that there is a deficiency in the amount of $500,000.00." (Emphasis ours.)

The decision of the Board of Tax Appeals was affirmed by the Circuit Court of Appeals in Commissioner of Internal Revenue v. Duke, 62 Fed. (2) 1057 (C. C. A. 3), in which the Court says:

"In this tax case the Commissioner appeals from a decision of the Board of Tax Appeals. The decisive question is whether two trust agreements created by James B. Duke, the decedent, seven years before his death, were intended to take effect in possession or enjoyment at or after his death. The facts are discussed in the opinion of the Tax Board reported at 23 B. T. A. 1104, and we avoid needless repetition by reference thereto. The trust instruments were executed, delivered and went into effect in 1917. They were irrevocable."

"The situation here is akin to the principle laid down by the Tax Board in Wheeler v. Commissioner of Internal Revenue, 20 B. T. A. 695:

" 'The trustor retained no control, possession or and could be only those of a trustee.'

"Moreover, all of the discretions vested in either or both of the trustees were to be exercised for the benefit, not of themselves or for the creation of the trusts, but wholly for the benefit of the beneficiaries under the trust. While the amount here involved is

large, the decisive principle is simple. The facts and authorities have been so fully discussed by the Tax Board that we confine ourselves to affirming their decree."

Certiorari was granted to the Commissioner from the decision of the Circuit Court of Appeals, and in this court, in the case of Helvering, Commissioner, v. Duke, 290 U. S. 591, 54 S. Ct. 95, 78 L. Ed. 87, the following order was entered:

"October 23, 1933. Per Curiam: Decree affirmed by an equally divided court. Mr. Chief Justice Hughes took no part in the consideration or decision of the case."

In Elizabeth B. Wallace, Executrix, v. Commissioner, 27 B. T. A. 902, the decedent transferred to the Guaranty Trust Company of New York certain property to collect the income therefrom and pay the same over to the decedent for and during the term of her natural life. The trust instrument contained the following clauses:

"Third: Upon the death of said 'Grantor' the 'Trustees' are hereby directed to and they shall pay over, assign, transfer and deliver the entire trust estate remaining undisposed of in their hands to 'Grantor's' daughter, Elizabeth V. Bulen, if she be living, absolutely and forever.

"Fourth: It is hereby mutually fully understood and agreed that if Elizabeth V. Bulen dies before the 'Grantor,' during the continuance of this trust, that the trust herein created then ceases and is of no further force and effect, and in such case the 'Trustees' are then hereby authorized and directed to turn over to the 'Grantor,' freed from this trust, all of the principal and income of said trust, after deducting

all commissions, as hereafter provided for legal or other expenses or proper indebtedness incurred by said 'Trustees.' "

The Board of Tax Appeals held the trust was not taxable, saying:

"In the McCormick case, as in the instant proceeding, there was a possibility of the trust property reverting to the grantor in the event that the beneficiary predeceased her. That event did not happen and apparently made no difference in the Supreme Court's decision, although some point is made of this possibility of reversion before the Circuit Court of Appeals, which reversed the Board (43 Fed. [2] ..), which in turn was reversed by the Supreme Court. • • • Elizabeth V. Bulen's interest in the trust property vested upon the execution of the trust instrument in 1920 and the death of the grantor was not the generating source of definite accession to the survivor's property rights, but merely the obliteration of the decedent's life estate, upon which event the daughter came into possession of the property, to which her rights had been fixed and vested upon the execution of the trust instrument in 1920. There was no transfer from the dead to the living upon which to levy the estate tax. The value of the trust property was incorrectly included in the decedent's gross estate."

The Board's decision was affirmed by the Circuit Court of Appeals for the Second Circuit in Commissioner v. Wallace, 71 Fed. (2nd) 1002 (C. C. A. 2), upon authority of McCormick v. Burnet, supra, and May v. Heiner, supra. This Court, on October 15, 1934, denied the Commissioner's application for certiorari (293 U. S. 600). Upon the authority of these cases, Commissioner v. Bonney, 75 Fed. (2nd) 1008 (C. C. A. 2), and Commissioner v. Dunham,

73 Fed. (2nd) 752 (C. C. A. 7), have been decided in favor of the respective taxpayers and no appeal taken by the Commissioner.

In all the foregoing cases there was provision for the reversion of the trust property to the grantor in the event the beneficiary or beneficiaries predeceased the grantor. In McCormick v. Burnet, supra, the grantor had complete control over the disposition of the income and the undistributed balance was to accumulate. In many of the cases the entire income was to be paid over to the grantor for life, so that no beneficiary had any interest in the income. In Helvering v. Duke, supra, the amount of income to be paid over to the beneficiary rested in the sole discretion of the grantor as trustee and the undistributed balance was to accumulate. In none of the cases could absolute title in the trust property vest in the beneficiary until the death of the grantor. In all these cases defeasible interests of beneficiaries were rendered indefeasible by the death of the grantor. In all these cases the Government argued unsuccessfully that the transfer from the decedent was contingent upon his death and that no transfer from the decedent took place until at and as a result of his death. Under these circumstances, we submit, the question is no longer an open one.

In reliance upon the decision in McCormick v. Burnet, supra, respondents have not paid estate tax to the State of Missouri within the time allowed for taking credit upon federal estate tax under Section 301 (b), Revenue Act of 1926. To change the law at this time would work an unjustified hardship on respondents and would tend to discriminate between taxpayers.

Cases Relied On by Petitioner.

In the court below the petitioner cited Saltonstall v. Saltonstall, 276 U. S. 260, 48 S. Ct. 225, 72 L. Ed. 565; Chase National Bank v. United States, 278 U. S. 327, 49 S. Ct. 126, 73 L. Ed. 405; Reinecke v. Northern Trust Company, supra; Klein v. United States, 283 U. S. 231, 51 S. Ct. 398, 75 L. Ed. 996; Tyler v. United States, 281 U. S. 497, 50 S. Ct. 356, 74 L. Ed. 991; Porter v. Commissioner, 288 U. S. 436, 53 S. Ct. 451, 77 L. Ed. 880; Sargent v. White, 50 Fed. (2nd) 410; Hoblitzelle v. United States, 3 Fed. Supp. 331, and Union Trust Co. v. United States, 54 Fed. (2nd) 152, certiorari denied 286 U. S. 547.

Saltonstall v. Saltonstall, supra, involved the constitutionality of a state inheritance tax, and, in addition, the trust there involved was revocable.

In Reinecke v. Northern Trust Company, supra, those trusts which were held taxable were revocable.

In Porter v. Commissioner the decedent retained the power to make any change in the disposition of the trust property except to reclaim it himself, and the Court held that the property was taxable under section 302 (d) of the act.

In Chase National Bank v. United States, supra, the Court held constitutional the specific section of the act imposing a tax upon the proceeds of policies of insurance where the decedent retained all the legal incidents of ownership over the policies during his lifetime.

In Tyler v. United States, supra, the Court held constitutional the specific section of the act which required the inclusion in a decedent's gross estate of property in which he had, during his lifetime, an interest as tenant by the

entirety, except where shown that the other tenant had contributed a portion of the consideration therefor. The opinion virtually concedes that the tax imposed by this particular provision is a succession rather than a transfer tax, but holds that it was a proper death duty which Congress had the power to impose if it chose to do so. (See Coolidge v. Long, supra, l. c. 609.) The language of the last two cases has to do with the subjects upon which Congress may, within its constitutional powers, levy death duties. It has no bearing upon what constitutes a transfer within the meaning of section 302 (c) of the act. The fact that Congress deemed it necessary to enact these special sections indicates that it did not consider that the subject matter thereof, namely, the enlargement or ripening of an interest of a living person by reason of the death of another, was included under the category of transfers intended to take effect at death.

In the Klein Case a husband made a deed of property directly to his wife, as follows:

> "First. To have and to hold the said lands unto the said grantee for and during the term of her natural life, and if she shall die prior to the decease of said grantor then and in that event she shall by virtue hereof take no greater or other estate in said lands and the reversion in fee and to the same shall in that event remain vested in said grantor, his heirs and assigns, such reversion being hereby reserved to said grantor and excepted from this conveyance.
>
> "Second. Upon condition and in the event that said grantee shall survive the said grantor, then and in that case only the said grantee shall by virtue of this conveyance take, have and hold the said lands in fee simple, unto the sole use of herself, her heirs, and assigns forever."

The Court held the property taxable, saying (l. c. ...):

> "The two clauses of the deed are quite distinct—the first conveys a life estate; the second deals with the remainder. The life estate is granted with an express reservation of the fee, which is to 'remain vested in said grantor' in the event that the grantee 'shall die prior to the decease of said grantor.' By the second clause the grantee takes the fee in the event—'and in that case only'—that she shall survive the grantor. It follows that only a life estate immediately was vested. The remainder was retained by the grantor; and whether that ever would become vested in the grantee depended upon the condition precedent that the death of the grantor happen before that of the grantee. The grant of the remainder, therefore, was contingent."

In this case by the first clause only a life estate was carved out of the fee. The balance of the fee was expressly reserved to the grantor and by the express provisions of the instrument was not to pass out of the grantor until the happening of a condition precedent, namely, his death prior to that of his wife. In the present case, as in the McCormick Case, the Wallace Case and the other cases cited herein, the fee passed by the grant, only to be revested in the grantor upon the happening of a condition subsequent. The McCormick Case and the Klein Case were argued the same day (February 27, 1931), and in the one the property was held taxable and the other not taxable.

In Sargent v. White, supra (C. C. A. 1), the decedent made a transfer in trust:

> "To pay over in their discretion as they may deem advisable the whole or any part of the net income of the trust estate to me, the said Frank W. Remick,

or in their discretion, in case they deem it advisable, to accumulate any part or the whole of the net income, and such part of the net income as is not paid to me shall in each year be added to and made part of the principal of the trust fund. If I survive my wife, Mary H. Remick, then upon the decease of my said wife, Mary H. Remick, said trust shall cease and the Trustees shall pay over, transfer, deliver and convey the Trust Estate absolutely free and discharged of every trust to me, said Frank W. Remick. If, however, my said wife, Mary H. Remick, survives me, then the Trustees shall upon my death pay over, transfer, deliver and convey the trust estate absolutely free and discharged of every trust to my said wife, Mary H. Remick."

The trial court, in Sargent v. White, 46 Fed. (2nd) 79, held the property taxable because of the interest in the income retained by the grantor upon the authority of Morsman v. Commission, 44 Fed. (2d) 902 (C. C. A. 8), which had not then been reversed by the Supreme Court. On appeal, the Circuit Court of Appeals sustained the District Court upon the ground that the decedent had in effect "conveyed the trust funds to the trustees to hold during his life, with a contingent remainder in himself and in his wife." The distinction between this case and the instant case is obvious from the fact that in the instant case the decedent's children are named as the beneficiaries of the trust, whereas in the Sargent case the decedent named himself and his wife as the joint beneficiaries. The effect of the conveyance in the Sargent case was to create an equitable estate by the entirety, and, had the property been real estate, the decedent would have accomplished the exact equivalent if he had transferred the property to a trustee to hold for the benefit of Frank W. Remick and

Mary H. Remick, his wife, as tenants by the entirety and not as tenants in common. Immediately before the transfer in the Sargent case Remick owned the property outright and immediately after the transfer he had a present joint beneficial interest in the property which was at least equal to, if not greater, than that of his wife. In the present case immediately after the transfer each beneficiary had a determinable equitable fee, and Mr. Guy had only a possibility of reverter (see Bonney v. Commissioner, supra).

In Hoblitzelle v. United States, supra, the decision of the Court of Claims does contain a dictum to the effect that because the trust property might revert to the grantor in the event of the death of either of her daughters, during her lifetime, the interest would be taxable. However, the statement is completely unnecessary to the decision of the case, which is based upon the fact that the decedent retained the power to alter and amend the trust which made it taxable under subsection (d) of the act upon the authority of Porter v. Commissioner, supra. Under these circumstances the dictum does not represent the opinion of the Court, but only of the Judge who wrote it. (See Safe Deposit & Trust Company v. Tait, 7 Fed. Supp. 40, l. c. 47.)

In Union Trust Co. v. United States, supra, the beneficiary had the mere possession of the property until the grantor's death.

Significance of Amendments of the Law.

Immediately after the decisions of the Supreme Court in the cases of Burnet v. Northern Trust Company, supra; Morsman v. Burnet, supra, and McCormick v. Burnet, supra, were handed down, Congress, by joint resolution,

on March 3, 1931, which was approved by the President at 10:30 p. m. that day, amended Section 302 (c) of the Revenue Act of 1926 by adding thereto the language hereafter set out in bold-face type, so that the same read as follows:

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, **including a transfer under which the transferor has retained for his life or any period not ending before his death (1) the possession or enjoyment of or the income from the property or (2) the right to designate the persons who shall possess or enjoy the property or the income therefrom** * * *."

In proposing this resolution in the House, Mr. Hawley, chairman of the ways and means committee, said:

> "Yesterday afternoon the Supreme Court of the United States handed down decisions in three cases—Burnet against Northern Trust Co., Morsman against Burnet, and McCormick against Burnet—in which the Court held that where an owner of property had made a transfer in trust reserving the income of the property, or the right to dispose of the income therefrom, to himself for life, with remainder to others after his death, the value of the property should not be included in the estate of the donor for purposes of federal estate tax upon his death.
>
> "It had generally been considered that this provision of the statute covered cases such as those referred to above. The Treasury Department had so construed the statute since the first federal estate tax law in 1916 and its regulations so provide. If, for example, the owner of property transferred the title to his house to a trustee for the benefit of his children

after his death, but in the meantime reserved the use, income and enjoyment of the house to himself during his own lifetime, it was supposed that the value of the property at the date of his death should be included in his estate for purposes of estate tax. Under the decisions rendered yesterday the property would not be included in computing the federal estate tax.

"It is entirely apparent that if this situation is permitted to continue, the federal estate tax will be seriously affected. Entirely apart from the refunds that may be expected to result, it is to be anticipated that many persons will proceed to execute trusts or other varieties of transfers under which they will be enabled to escape the estate tax upon their property. It is of the greatest importance therefore that this situation be corrected and that this obvious opportunity for tax avoidance be removed. It is for that purpose that the joint resolution is proposed."

Similar statements were made in the Senate by Senator Smoot, chairman of the finance committee, in presenting this joint resolution.

From the language of the amendment and the purpose of the resolution as stated by the chairman of the ways and means committee, it is obvious that purpose of the change was to make explicit Congress' intention to make transfers taxable where the grantor retained the income for life, as was done in the Morsman and Northern Trust Company cases, or the right to designate the persons who should receive the income or the property, as was done in the McCormick case. No exception whatever was taken to the decision in the McCormick case upon the question that the possibility that the trust property might revert to the grantor did not make the property taxable. This would seem to be conclusive evidence that Congress agreed with the Supreme Court's holding in the McCor-

mick case and agreed with the Supreme Court's construction of the Revenue Act of 1926, then in force, to the effect that a mere possibility of reverter of the property reserved in the transferor did not make the transfer one intended to take effect in possession or enjoyment at or after death. The reason for this is obvious when the actualities of the situation are considered. In a general sense all taxation, direct and indirect, has its foundation in the protection which the sovereign furnishes the taxpayer in the exercise of the privilege of owning and using property. Where a man has the unfettered enjoyment of the income of property he is to all intents and purposes the owner of the property and it is only fair that the property should be so treated for purposes of taxation. Where, however, he has parted with all title to the property, both principal and income, and all beneficial interest therein, retaining only a chance that upon the happening of a contingency which he can neither accelerate nor retard he may reacquire the property, he is no longer the owner of the property in any practical sense of the word. To treat the property as his for purposes of taxation would be to levy a tax which has no reasonable relation to the privilege taxed.

Section 302 of the Act of 1926 was further amended by Section 803 (a) of the Act of 1932, the amendment consisting of the matter in bold-face type, so that the section now reads:

> "(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has

retained for his life or **for any period not ascertainable without reference to his death or for any period which does not in fact end before his death** (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *"

The purpose of the latter amendment is set out in the Report of the Senate Finance Committee on Revenue Bill of 1932, as follows:

"The purpose of this amendment to Section 302 (c) of the Revenue Act of 1926 is to clarify in certain respects the amendments made to that section by the joint resolution of March 3, 1931, which were adopted to render taxable a transfer under which the decedent reserved the income for his life. The joint resolution was designed to avoid the effect of decisions of the Supreme Court holding such a transfer not taxable if irrevocable and not made in contemplation of death. Certain new matter has also been added, which is without retroactive effect.

"The changes are:

"(1) The insertion of the words 'or for any period not ascertainable without reference to his death,' is to reach, for example, a transfer where decedent reserved to himself semiannual payments of the income of the trust which he had established, but with the provision that no part of the trust income between the last semiannual payment to him and his death should be paid to him or his estate, or where he reserves the income, not necessarily for the remainder of his life, but for a period in the ascertainment of which the date of his death was a necessary element.

"(2) The insertion of the words 'or for any period which does not in fact end before his death,' which is to reach, for example, a transfer where decedent, 70 years old, reserves the income for an extended term of years and dies during the term, or where he is to have the income from and after the death of another person until his own death, and such other person predeceases him. This is a clarifying change and does not represent new matter.

"(3) The insertion of the words 'the right to income' in place of the words 'the income' is designed to reach a case where decedent had the right to the income, though he did not actually receive it. This is also a clarifying change.

"(4) The insertion of the words 'either alone or in conjunction with any person' is to reach a case where decedent had a right, with the concurrence of another person or persons, to designate those who should possess or enjoy the property or the income therefrom (Senate Finance Committee Report on Revenue Bill of 1932."

The section as amended remained in effect under the 1934 Act. After full consideration Congress has not made any attempt specifically to include within the language of section 302 (c) a transfer where the only interest retained by the grantor is a possibility that the trust property may revert to him upon the happening of an event over which he has no control.

Doubts Resolved in Favor of Taxpayer.

The question here presented is not whether Congress has power under the Constitution to tax transfers containing a provision of the type involved, but whether under a proper construction of the law Congress intended to make taxable an irrevocable transfer made by a decedent

during his lifetime in which he parted with all beneficial interest in the property as one intended to take effect in possession or enjoyment at or after the grantor's death, simply because upon the happening of a contingency over which the grantor has no control the property might revert to the grantor. Unless the Court can say that there is no doubt that Congress did so intend the opinion of the Circuit Court of Appeals should be affirmed.

Gould v. Gould, 245 U. S. 151, l. c. 153:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen."

U. S. v. Merriam, 263 U. S. 179, l. c. 187:

> "On behalf of the Government it is urged that taxation is a practical matter and concerns itself with the substance of the thing upon which the tax is imposed rather than with legal forms or expressions. But in statutes levying taxes the literal meaning of the words employed is most important, for such statutes are not to be extended by implication beyond the clear import of the language used. If the words are doubtful, the doubt must be resolved against the Government and in favor of the taxpayer."

To the same effect are:

Crocker v. Malley, 249 U. S. 223, l. c. 233;
United States v. Field, 255 U. S. 257, l. c. 262;
Smietanka v. First Trust & Savings Bank, 251 U. S. 602, 606;
Shawb v. Doyle, 258 U. S. 529, 534;
Rienecke v. Northern Trust Co., supra.

Conclusion.

In conclusion, we respectfully submit that the decisions of this Court in McCormick v. Burnet, and May v. Heiner, required that the Circuit Court of Appeals decide this case in favor of respondent for the reasons set forth in the opinion of that Court, as follows (R. 137):

> "It seems, then, that the question as to whether the transfer was one to take effect in possession or enjoyment at or after Mr. Guy's death depends entirely upon whether by the trust instruments he, as an individual, parted with every vestige of control over the beneficial enjoyment and possession of the property conveyed. In order to sustain the conclusion of the lower court that he, as an individual, retained some vestige of control over the beneficial enjoyment and possession of the trust property until his death, we would be obliged to point out what it was he retained. It is clear that the legal title to the trust property passed from him upon the execution of the trust instruments. The possession of the trust property which he had formerly held as an individual he thereafter held as a trustee. The income from the trust property was no longer his. He was obliged either to pay the income over to the beneficiaries or to accumulate it for them. The powers with which he clothed himself as trustee were not to be exercised by him for his own benefit, but only for the benefit of those for whom he had constituted himself trustee. The only interest, then, which he retained was the right to have the trust property revert to him in case the beneficiaries should predecease him. That right to the reversion was not an interest which passed to the beneficiaries as the result of Mr. Guy's death. It was merely an interest which was obliterated by his death. It passed not to the living, but entirely out of existence. So far as we can discern, the rights of the

beneficiaries of the trust property were complete at the time the declarations of trust were executed. Thereafter Mr. Guy, as an individual, had no interest in the property then or thereafter held by him as trustee, except the right to a reversion on certain conditions over which he had no control. Hence, nothing could have passed from him to the beneficiaries of the trust at the time of his death, although that event, by virtue of the terms of the declarations of trust, gave them the rights with respect to his property which the declarations of trust provided they should have if they survived him."

Respectfully submitted,

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No. 262.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

LOUIS J. BECKER, Collector of Internal Revenue,

Petitioner,

v.

ST. LOUIS UNION TRUST COMPANY, a Corporation, and WILLIAM EDWIN GUY, Executors of the Estate of William Evans Guy, deceased,

Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

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No. 262.

IN THE

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ST. LOUIS UNION TRUST COMPANY, a corporation, and WILLIAM EDWIN GUY, Executors of the Estate of William Evans Guy, deceased,
Respondents.

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

Summary of Argument.

I.

There was no evidence to support the Trial Court's finding that the trusts were created in contemplation of death.

II.

The thing taxed is the transmission of property from the dead to the living. If no substantial rights of control or enjoyment are retained by the decedent, the nature of the title, if any, retained is controlling.

III.

The instruments created fees, not life estates, and nothing of substance was retained. The distinction

between a vested interest and an expectancy is one of substance.

IV.

The right to the return of the property which remained in the decedent was not capable of valuation. The valuation made by the Commissioner, if sustained, would render the statute of doubtful constitutionality.

V.

The argument that *McCormick* v. *Burnet* was decided without due consideration of the question here involved and without reference to *Klein* v. *United States* is refuted by an examination of the record in the *McCormick* case.

Argument.

Trusts Not Created in Contemplation of Death.

The Trial Court found, as a fact, that one of the decedent's motives in creating the trusts was "to make provision for the distribution of the property to his children at decedent's death (R. 16)". The finding, being no broader than the evidence which supports it, amounts to no more than a finding of the unquestioned fact that each trust contains a provision for distribution upon decedent's death. As pointed out in our brief in chief, such a provision affords no evidence that the trusts were testamentary in character or were made in contemplation of death. Neither does the presence of such provision have the slightest tendency to indicate that the thought of death in the sense of a specific concern with the ap-

proach of a future event with a view to which action was taken possessed the mind of the decedent. It does show that the decedent, in common with all intelligent men, was not unmindful of the fact that he would have to die some time. Each trust also provides for the termination of the trust upon the death of the beneficiary prior to decedent's death. It could be argued with equal force that the trusts were created in contemplation of the death of the beneficiary.

The purposes which the evidence showed the decedent wished to accomplish by these trusts could not have been effected without the transfer of the principal. The gift of the income without any transfer of the source of the income would have been ineffective. The gift of the income is inseparable from the transfer of the corpus.

The record shows that the Commissioner never determined that the transfers were made in contemplation of death (R. 6, 10, 11, 37). "The original assessment rested upon a finding presumptively correct, but the presumption of its correctness does not extend to other findings which the Commissioner has never made". *Taylor* v. *Commissioner*, 70 Fed. (2d) 619, C. C. A. 2; *First National Bank of Boston* v. *Commissioner*, 63 Fed. (2d) 685, C. C. A. 1.

Even if any presumption existed, it was rebuttable and vanished upon introduction of affirmative testimony to the contrary. *Willcutts* v. *Stultz*, 72 Fed. (2d) 868, 872; *Flannery* v. *Willcutts*, 25 Fed. (2d) 951; *Brown* v. *Commissioner*, 74 Fed. (2d) 281; *Lippincott* v. *Commissioner*, 72 Fed. (2d) 798.

TRUSTS NOT INTENDED TO TAKE EFFECT AT DEATH.

As used in the Act, "possession and enjoyment" refer to the *right* to possession and enjoyment, rather than actual possession and enjoyment. If the right to receive the trust property either in fee or in remainder is, by the instrument, fixed in a person other than the grantor, the death of the grantor may be the event upon which actual enjoyment vests without incurring tax, *Reinecke* v. *Northern Trust Company*, 278 U. S. 339; *Coolidge* v. *Long*, 282 U. S. 582; *Burnet* v. *Northern Trust Company*, 283 U. S. 782; *Morsman* v. *Burnet*, 283 U. S. 783; *May* v. *Heiner*, 281 U. S. 238. Conversely, where the right to take the property upon the termination of a particular estate remains in the grantor until his death, no transfer takes place until that time even though actual possession and enjoyment have been given to another. *Klein* v. *U. S.*, 283 U. S. 231.

The petitioner's theory ignores the fundamental character of the tax. "The thing taxed is the transmission of property from the dead to the living" (*Heiner* v. *Donnan*, 285 U. S. 312, 322). This Court has never held a trust taxable as a transfer intended to take effect at or after death except where the grantor retained an interest in the property which passed to the living upon his death. An interest sufficient for taxability may be one of control, possession, beneficial enjoyment or title. If a power of recall or of control is reserved, it is immaterial that technically title may be lodged elsewhere. *Reinecke* v. *Northern Trust Company*, *supra* l. c. 345; *Coolidge* v. *Long*, *supra*, l. c. 629. Where, as here, no substantial rights of control or enjoyment are reserved, nothing remains but title to which the tax can attach. In

such a case, the nature of the title retained becomes controlling.

The Government contends that only life estates were created. If further authority that defeasible fees were created, be needed, we submit the following: *Duval* v. *Duval,* 316 Mo. 626, 291 S. W. 488. A will devised land "to my son John C. Duval and my daughter, Molly R. Ewing" and provided "these lands are given under these express conditions: that neither of these devisees having any children and if either die leaving no living child, the other shall inherit the entire lands, and if both should die leaving no child or children living, then said lands *shall revert to my estate* and be divided amongst my other living children, or, if dead, their children, if any living. Said lands cannot be sold by said devisees except for life of either or the survivor, but if they or either of them shall have any living children, then said lands shall be an absolute gift and shall be treated so in all respects". (Italics ours.)

Held, a defeasible fee and not an estate for life or lives was created, and, after the birth of a child to Molly the deed of John and Molly conveyed the entire estate.

Sullivan v. *Garesche,* 229 Mo. 496, 129 S. W. 949.

A residuary clause in a will provided as follows:

> "All the rest and residue * * * I give and bequeath to my daughters Kate and Julia in equal parts between them, *to have and to hold same as hereinafter stated.* In case of the marriage or the death of either of my said

daughters Kate and Julia, the share of the one so marrying or dying shall go to the other." (Italics ours).

"In the event of the marriage or death of my said daughters Kate and Julia, said property shall be divided equally among all of my children."

"In the event of the death of both of my said daughters, Kate and Julia before marriage, said property shall be divided equally among my surviving children."

Held l. c. 507:

"The will of Maria Taylor does not in terms give to the two daughters named a life estate; it gives them the property in fee subject to being cut down to a life estate in the event of their death without ever having married. The language of the will is: 'All the rest and residue of my property of which I may be possessed at the time of my death, I give and bequeath to my daughters Kate and Julia in equal parts between them. To have and to hold the same, as hereinafter stated'. That is to say, it is an absolute estate except as it might be cut down as thereinafter specified. Under the express term of our statute, Section 4646, Revised Statutes, 1899, words of inheritance are not necessary in a will to create an estate in fee; when an estate is granted it is limited or qualified only by words in the will limiting or qualifying it. The only words in this will limiting or qualifying the estate granted are: 'In the event of the death of both of my said daughters Kate and Julia before marriage the said property shall be divided equally among my surviving children'. Therefore if they or either of them should marry the event

> on which their estate might be cut down can never occur and their estate will remain absolute."

Also l. c. 507:

> "But if the particular estate is not a mere life estate, if it is a determinable fee, liable to be cut down on the happening of the event on which the future estate depends and that event does not occur, then the fee is not cut down and there is no reversion."

Also l. c. 509:

> "After a particular estate, something remains. After a fee, nothing."

The decedent here had what was left of the fee after a determinable fee has been granted. This was not a present interest in the property. *Sullivan* v. *Garesche, supra.* He had the same interest which C would have on a grant from A to B in fee; if B dies before C, then to C, but if C dies before B, then to remain B's absolutely—a mere expectancy, not even a contingent remainder. In the *Klein* case and in *Commissioner* v. *Schwartz,* 74 Fed. (2d) 712, the grantors had what was left after a life estate—a vested right to the property immediately upon the determination of the life estate. The courts have consistently maintained this distinction. *Klein* v. *Commissioner,* 42 Fed. (2d) 596. Where there is a defeasance clause the transfer is complete and vested when made; the possibility of reverter to the grantor may take effect, but, if so, it takes effect by way of a condition subsequent and "at or after" the death of someone else, not the grantor; his death transmits nothing, on it his expectancy simply lapses. Where there is a retained reversion or remainder the transfer is incom-

plete when made, something is left in the grantor; it goes from him, if at all, only on his death, which thereby is made a condition precedent; it therefore takes effect at his death, is transmitted by his death. See, also, IV Kent. Com. (6th ed.) star paging pp. 9-10 and notes 124-33, 202-06, 353-6; Challis on Real Property, 2nd Ed., pp. 73-5; 1 Tiffany on Real Estate (1920 Ed.), Sec. 93; *Robeson* v. *Duncan*, 74 N. J. Eq. at p. 570; *Finlay* v. *King*, 3 Pet. 346, 374-5; *Croxall* v. *Sherrerd*, 5 Wall. 268, 287-8; *Doe* v. *Considine*, 6 Wall. 458; *Schulenberg* v. *Harriman*, 21 Wall. 44; *Shukert* v. *Allen*, 273 U. S. 545; *Coolidge* v. *Long*, *supra*; *Freeholders of the County of Cumberland* v. *Buck*, 79 N. J. Eq. 472, 475; *Dusenberry* v. *Johnson*, 59 N. J. Eq. 336; *First Universalist Society* v. *Boland*, 155 Mass. 171, 174-5; *Nicoll* v. *N. Y. & E. R. R. Co.*, 12 N. Y. 121, 130-1, 132, 134; *Upington* v. *Corrigan*, 151 N. Y. 143, 150-3; *Calvary Presbyterian Church* v. *Putnam*, 249 N. Y. 111, 115-6; *Curley* v. *Tait*, 276 Fed. 840, 842; *Burnet* v. *Pacific etc. Bank* (C. C. A. 9), 45 F. (2nd) 773, 777, certiorari denied, 283 U. S. 825; *Nichols* v. *Bradley* (C. C. A. 1), 27 F. (2d) 47, 48.

In *Matter of Barstow*, 230 N. Y. App. Div. 371, 372-3, affirmed 256 N. Y. 647, the same ruling was made as to a defeasance clause under the New York inheritance tax law. The Court said:

> "* * * Mrs. Barstow could do nothing to change the effect of the deed. The corpus was beyond her control, except for the happening of the contingency that she might survive the two life tenants, and then she would have been revested with the corpus. *The rights of the beneficiaries did not depend upon the death of the donor. The term of the trust was not mea-*

sured by the life of the donor, but by the lives of her two daughters. * * * There was the contingency that she might survive her daughters, and that did not depend upon affirmative or volitional act of the donor. As stated by Judge Cardozo in the *Schmidlapp* Case (236 N. Y. 278): 'In *Matter of Craig* (97 App. Div. 289, aff'd 181 N. Y. 551) the remainder was contingent, *but the contingency was not dependent on the will of the donor and the right as against him was already perfect and complete'.* And so, in the present case, the right independent of anything Mrs. Barstow could do, was already complete." (Italics ours.)

Furthermore, the expectancy or possibility which the decedent had was not capable of valuation. The Commissioner has not attempted to evaluate it. An unrealized expectancy constitutes neither an asset of an estate (*Pringle* v. *Commissioner* (C. C. A. 9), 64 Fed. (2d) 862; *Commissioner* v. *Rosser* (C. C. A. 3), 64 Fed. (2d) 631) nor a deduction from an estate when in favor of a charity (*Humes* v. *United States*, 276 U. S. 487).

Patently, the value of the expectancy was not equal to the value of the fee simple estate in the property, nor even to a small percentage thereof. Yet, the Commissioner has assessed a tax upon the same basis. A tax which bears no reasonable relation to the privilege taxed is arbitrary and void. *Nichols* v. *Coolidge*, 274 U. S. 531. A construction should be avoided which would render the statute as applied of doubtful constitutionality. *Reinecke* v. *Northern Trust Company, supra.* We are not prepared to say that Congress has no power to levy a tax upon the con-

version of a beneficiary's interest from a defeasible to an indefeasible one upon the death of a grantor or another. (*Cf. Tyler* v. *United States,* 281 U. S. 497; *Chase National Bank* v. *United States,* 278 U. S. 327. We do say that Congress has not undertaken to tax such a conversion as a transfer intended to take effect at death.

An examination of the record in the *McCormick* case refutes utterly the argument that this Court did not intend that case to be a decision upon the question involved in the instant case. The record reveals that the *McCormick* case was advanced on the docket to be argued together with the *Klein* case because, as stated by the Government in its motion, they involved a related question—the same question here involved; that the major portions of the briefs of both parties were addressed to this question; and that the Court considered the cases together and, after due consideration, distinguished them upon the ground that the *McCormick* case involved a conveyance in fee with a mere possibility of reverter, whereas, the *Klein* case involved a present conveyance only of a life estate with the reversion expressly reserved.

Respectfully submitted,

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Counsel for Respondents.

SUPREME COURT OF THE UNITED STATES.

No. 262.—October Term, 1935.

Louis J. Becker, Collector of Internal Revenue, Petitioner,
vs.
St. Louis Union Trust Company and William Edwin Guy, Executors of the Estate of William Evans Guy, Deceased.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[November 11, 1935.]

Mr. Justice Sutherland delivered the opinion of the Court.

The decedent in 1921 executed separate declarations of trust in favor of each of his four children, conveying to himself as trustee certain securities. He died in 1928, at which time the entire trust estate conveyed by the four trusts amounted to nearly a million dollars, which amount was included by the Commissioner of Internal Revenue as a part of the gross estate of the decedent and an additional estate tax assessed accordingly. The executors, having paid the additional tax, brought this action in a federal district court sitting in Missouri to recover the amount. The district court denied recovery upon the grounds that the transfer effected by each declaration of trust was made in contemplation of death and that it was intended to take effect in possession or enjoyment at or after decedent's death.

The Court of Appeals, after a very full review of the facts and authorities, reversed the judgment. 76 F. (2d) 851. The case is here on certiorari.

The declarations of trust were in identical terms. By each the grantor declared that he held in trust for the person named certain property which was described. A copy of one of them is set forth in the opinion of the court below. The trust instrument gave the trustee usual discretionary power with respect to sale of the trust property, reinvestment of proceeds, collection of rents, income and profits, payment of taxes and expenses incident to the care, preservation and management of the property; and provided that he

should pay to the beneficiary an allowance of $300 a month, which might be increased or decreased from time to time in his discretion. Income not distributed was to be added to the principal. The final clause of the declaration provided:

"6. (a) If the said beneficiary should die before my death, then this trust estate shall thereupon revert to me and become mine immediately and absolutely, or (b) if I should die before her death, then this property shall thereupon become hers immediately and absolutely and be turned over to her and in either case this trust shall cease."

The government presents for our determination two questions—whether, under the provisions of § 302 (c), Revenue Act of 1926, a transfer of the property under each of the instruments here involved, (1) was intended to take effect in possession or enjoyment at or after the death of the grantor; (2) was made in contemplation of death.

First. The first of these questions is settled by our decision just rendered in the case of *Helvering* v. *St. Louis Union Trust Co., et al.*, ante, p. —. By the declaration of trust here under review, the legal title, possession and control of the trust estate passed irrevocably from the grantor as an individual to himself as trustee. The effect is no different than if the trustee had been another person. Cf. *Reinecke* v. *Trust Co.*, 278 U. S. 339, 346. By the final paragraph of the declaration, quoted above, the grantor does not retain any interest in the property, but, recognizing the completeness of the transfer, he provides that the property shall revert to him in case the beneficiary shall predecease him. The provision that the trust estate shall "revert" in case of the predecease of the beneficiary removes any doubt as to the completeness of the transfer, if otherwise there would be any. The question, therefore, is whether the mere possibility of a reverter stamps the transfer as one intended to take effect in possession or enjoyment at or after the death of the grantor. The decision just rendered answers this question in the negative.

Second. The transfer to the trustee was complete and became effective when made, seven years before the death of the decedent. The factor which brings a gift *inter vivos* within the reach of § 302 (c) with respect to transfers made in contemplation of death "is to be found in the transferor's motive". *United States* v. *Wells*, 283 U. S. 102, 117. "Death must be 'contemplated,'

that is, the motive which induces the transfer must be of the sort which leads to testamentary disposition. . . . The question, necessarily, is as to the state of mind of the donor. . . . If it is the thought of death, as a controlling motive prompting the disposition of property, that affords the test, it follows that the statute does not embrace gifts *inter vivos* which spring from a different motive." p. 118. The opinion proceeds to give illustrations of those motives which have reference to life rather than to death—as, for example, the desire to be relieved of responsibility; to have children independently established with competencies of their own. In each case the circumstances are to be scrutinized in order to discover the dominant motive of the donor in the light of his bodily and mental condition. p. 119.

In the present case the district court found that the motive of decedent was to decrease his income tax by distributing a portion of his property among the four trusts and, at the same time, to make provision for the distribution of the property to his children at decedent's death, and concluded therefrom that the transfer was made in contemplation of death. The Circuit Court of Appeals reached the opposite conclusion. It found on the evidence that the decedent, in making the trusts, was actuated by two motives—(1) to make his children independent; (2) to avoid high surtaxes on his income; and that both of these motives were associated with life. Evidence that the decedent was in any way influenced in what he did by the thought of death, that court said, was entirely lacking.

It is true that the decedent at the time of making the trusts was 76 years of age. But the evidence shows clearly that he was in excellent health, attending regularly to business, apparently was not looking forward in any way to his death, came of a very long-lived family, expected to live well beyond the age of 90, and in fact lived seven years after making the trusts. The beneficiaries were all past 21 years of age, and the record shows only that the grantor's objects were to make them allowances in order to get rid of the nuisance of treating them as children, make them independent so they would know what they were to get each year, and, as he had ample income of his own, to avoid the high surtax and make each of his children pay a tax on the independent income received.

We are unable to find anything in the record which conflicts with the statement of the court below that evidence that decedent was in any way influenced by the thought of death was wholly lacking. The government argues that the finding of the trial court in respect of the matter is the same as that of the commissioner, and that this circumstance gives additional weight to that court's finding. Our attention has not been called to anything in the record which shows that the commissioner's determination rested upon such a finding. The petition alleges that the reason which brought about the commissioner's determination was that the transfer was one which "did not take effect in possession or enjoyment until at or after the death of the decedent", and that he so advised the respondents by letters. The answer affirmatively alleges that the commissioner's reasons were "that there had been no transfer of such property during the lifetime of the decedent; that such property was transferred at and as a result of the death of the decedent; and that such transfer was intended to take effect at or after the death of the decedent", and that the commissioner advised respondents accordingly. We are unable to find anything in the record which justifies the conclusion that the commissioner specifically determined that the transfers were made in contemplation of death, or, indeed, that there was any evidence before him on that subject.

In this state of the record it cannot be said that the finding of the trial court in this regard obtains any support from the determination of the commissioner. The situation simply is that the findings of the lower courts upon the matter are in conflict; and a careful examination of the evidence contained in the record convinces us that the finding of the trial court was erroneous, and we so hold.

Judgment affirmed.

The Chief Justice, Mr. Justice Brandeis, Mr. Justice Stone and Mr. Justice Cardozo dissent for reasons stated in their dissent in *Helvering* v. *St. Louis Union Trust Co.*, ante, p. —.

A true copy.

Test:

Clerk, Supreme Court, U. S.